APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 418

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,

Petitioner,

—v.—

WILLIAM S. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1968
CERTIORARI GRANTED NOVEMBER 12, 1968

INDEX TO THE APPENDIX

Chronological List of Dates on Which Pleadings Were Filed, Hearing Held and Orders Entered

1. Order Granting Motion to File Application for Writ of Habeas Corpus—filed July 17, 1967

2. Petition for a Writ of Habeas Corpus—received July 13, 1967

3. Return and Answer—filed August 3, 1967

4. Order Denying Motion to Dismiss—filed August 4, 1967

5. Order Discharging Petitioner from Custody—filed September 26, 1967

6. Hearing on the Merits—filed October 6, 1967

Order

[Filed July 17, 1967]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 2583-N

WILLIAM S. RICE,

Petitioner,

versus

CURTIS M. SIMPSON, Warden, Kilby Prison, Montgomery, Alabama,

Respondent.

Petitioner now presents to this Court his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County, Alabama, in February 1962, upon his pleas of guilty in state Court criminal cases Nos. 6427, 6428 and 6429, he was sentenced by said state Court to an aggregate of eight years in the state penitentiary. Petitioner alleges, further, that in August 1964 his pleas, and the judgment and sentence thereon in each of said state Court cases, were set aside upon his application, and the proof offered in support thereof, for the writ of error coram nobis. The petition now presented to this Court further avers that in December 1964 he was retried and,

upon conviction in the same circuit Court, was sentenced to a term of ten years in case No. 6427, ten years in case No. 6428, and in May 1965, after a conviction, was sentenced to a term of five years in case No. 6429. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted, now aggregate twenty-five years.

Petitioner alleges that, in resentencing him, the Circuit Court of Pike County failed to give him credit for prior time served on the original sentences, and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965, which sentences aggregate over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised and been successful in his post-conviction coram nobis proceeding. Petitioner alleges that it is constitutionally impermissible for the State of Alabama to force upon him the risk (here, a reality) of more severe punishment as a penalty for his having exercised and been successful in Alabama post-conviction proceedings.

Petitioner very candidly admits that he has not presented this issue to the Courts of the State of Alabama since he was reconvicted and resentenced by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965. He argues, instead, that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes in his case.

Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded

no post-conviction remedies by the State of Alabama where his only contentions, in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the Courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction proceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in Aaron v. State, 192 So. 2d 456 (Nov. 29, 1966), wrote:

> "Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. Isbell v. State, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that our remedy of coram nobis automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See Wilson, Federal Habeas Corpus and the State Court Criminal Defendant, 19 Vand. L. Rev. 741."

And, again, the same Judge, speaking for the same Court, in March 1967 in Ex Parte Merkes, reiterated the above-quoted statement from the Aaron case and stated further, "We see no reason to go into what should be the rule of credit for prior time until we have to."

The above cases, appearing to represent the law of the State of Alabama upon the question now presented in petitioner's application, make it apparent that Title 28, § 2254

of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented.

Accordingly, it is the Order, Judgment and Decree of the State of Alabama upon the questions now presented to this Court on July 13, 1967, seeking leave to file his application for a writ of habeas corpus in forma pauperis, be and the same is hereby granted. The Clerk of this Court is Ordered and Directed to file without the prepayment of fees and costs the petition for a writ of habeas corpus now presented to this Court by William S. Rice.

It is the further Order, Judgment and Decree of this Court that Curtis M. Simpson, Warden of Kilby Prison, Montgomery, Alabama, and /or any other appropriate official acting for or in behalf of the State of Alabama, on or before August 4, 1967, show cause, if any there be, why this Court should not issue the writ of habeas corpus as herein prayed for by the petitioner, William S. Rice.

It is further Ordered that the Honorable Oakley W. Melton, Jr., of Montgomery, Alabama, be and he is hereby appointed to represent William S. Rice in this action.

It is further Ordered that a copy of this order be served upon the said Curtis M. Simpson as Warden of Kilby Prison and that copies be mailed by certified mail to the Honorable MacDonald Gallion, Attorney General, State of Alabama, Montgomery, Alabama, to the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, and to the petitioner, William S. Rice, in care of the Warden of Kilby Prison, Montgomery, Alabama.

Done, this the 17th day of July, 1967.

FRANK M. JOHNSON, JR.,
United States District Judge.

Petition for a Writ of Habeas Corpus

[Received July 13, 1967]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

(Title Omitted in Printing)

Petitioner Alleges:

1. That he was illegally sentenced by the Circuit Court of Pike County, Alabama, in violation of the Constitution of the United States.

2. That on February 16, 1962, after adjudication of his guilty pleads, the Circuit Court of Pike County, Alabama did impose the following sentences upon the petitioner: four (4) years on Case No. 6427; two (2) years on Case No. 6428; and two (2) years on Case No. 6429; thus resulting in a cumulative term of eight (8) years.

3. That on August 28, 1964, the original conviction, judgment, and sentence on each of the above numbered cases was set aside upon petitioner's application for writ of error coram nobis claiming constitutional violation, i.e., denial of counsel.

4. That on December 3, 1964, after retrial and upon conviction by jury, the Circuit Court of Pike County, Ala-

bama, did impose upon petitioner the following sentences: ten (10) years on Case No. 6427; and ten (10) years on Case No. 6428.

5. That on May 18, 1965, after retrial and conviction by jury, the Circuit Court of Pike County, Alabama, did impose upon petitioner the following sentence: five (5) years on Case No. 6429; and thus resulting in an overall cumulative term of twenty-five (25) years on the above numbered cases.

6. That on December 3, 1964, and on May 18, 1965, after retrial and upon conviction by jury, the Circuit Court of Pike County, Alabama, did impose upon petitioner cumulative sentences in gross excessiveness of the cumulative sentences imposed upon petitioner at the time of his original trial in the above numbered cases, and the said Court did fail to give petitioner credit for prior time served on original cumulative sentences in the above numbered cases; all in violation of the Constitution of the United States.

7. That the State Courts of the State of Alabama does not, by statute or otherwise, afford petitioner an effective and/or corrective remedy to adjudicate his specific claim of constitutional violations; thus denying petitioner an effective and/or corrective post conviction remedy to adjudicate his claim of constitutional violations; all in violation of the Constitution of the United States.

8. That petitioner's instant cause does squarely come within the 'exceptional circumstances' provision of Title 28, Sec. 2254, U.S.C.: and that his petition to obtain federal habeas corpus at this time is not an attempt to

by-pass the exhaustive provision of the aforesaid statute; thus this Honorable Court's jurisdiction to adjudicate his cause is lawfully invoked.

9. That in support of the above stated allegations the petitioner hereto attaches an 'Argument In Support' to his petition and asks that it be made a part thereof.

Wherefore Petitioner Prays:

1. That process issue calling upon the hereinabove named respondent to show cause, if any there be, why the petitioner should not be forthwith discharged from custody and to be granted his liberty.

2. That process issue requiring the hereinabove named respondent, or counsel for him, to bring forth to this Honorable Court the complete State records in the three above numbered cases.

3. That a hearing be held with himself present to develop the issues of fact and law presented herein.

4. That this Honorable Court appoint counsel to assist petitioner in his cause because petitioner is a poor person and unable to employ counsel.

5. That upon final determination the writ of habeas corpus be sustained and petitioner discharged from custody forthwith.

WILLIAM S. RICE

Route 3—Box 115,
Montgomery, Alabama.

[Certification Omitted in Printing]

AFFIDAVIT IN FORMA PAUPERIS

William S. Rice, being sworn on oath as required by law, deposes and says that he is the petitioner in the annexed petition for writ of habeas corpus which he has prepared and now seeks to file in good faith. Because of his poverty he is unable to pay cost of same. He asks therefore, as a citizen of the United States of America that he be allowed to file and prosecute same without payment of cost.

WILLIAM S. RICE,
Affiant.

[Certification Omitted in Printing]

Argument in Support

Allegations 1 through 5.

For the sake of brevity petitioner will rely upon the records in his cause to support allegations 1 through 5; other than to direct this Honorable Court's attention to the fact that had he been legally sentenced and given credit for 'prior' time that he has more than served sufficient time to satisfy a cumulative sentence of eight (8) years, and is eligible for forthwith discharge.

Allegation 6.

In the case of Eddie W. Patton, v. State of North Carolina, —— F. 2d ——, June 1967, the U. S. Court of Appeals for the Fourth Circuit ruled that a prisoner granted a retrial on constitutional grounds cannot be given a sentence in the second trial greater than that imposed in the original proceeding; and not only is the punishment restricted that given at the time of the first conviction but the Court is the second trial must give credit for the time he already served. As Judge Simon E. Sobeloff stated:

> "It is impermissible to force upon an accused the risk of more severe punishment as a condition for securing a constitutional right."

and:

> "It is grossly unfair for society to take five years of a man's life and then say, 'we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen'."

and:

"Time illegally exacted by an unconstitutional sentence is an indisputable fact."

In the case of Perry Whaley v. State of North Carolina, —— F. 2d ——, June 1967, the same Court as in the Patton, case, supra, made substantially the same ruling.

Both the United States Court of Appeals for the First Circuit in Morano v. United States, March 1967, —— F. 2d ——, and the Supreme Court of California in the case of People v. Narga-Parbet Ali, March 1967, —— P. 2d ——, agreed that a criminal defendant cannot be put to a harsher sentence on appeal with the possibility of increasing a sentence at retrial. In the former case, the Court held that the judge should not be permitted to change his mind by deciding that he had been too lenient the first time. In the latter case, the Court stated that a defendant should not be put to the risk of being given a greater punishment on a re-trial for the privilege of exercising his right to appeal.

Petitioner in the case at bar grants that the two cases cited immediately above deals with cases on direct appeal; none the less petitioner submits that the principle of law involved is also applicable in a case where the original conviction and sentence is set aside, by way of post conviction remedy, on grounds of constitutional violation and then re-tried the second time—it follows that a 're-trial' is a 're-trial' regardless as to how it is brought about.

It is, indeed, judicially interesting to note that the Court of Appeals of Alabama in the case of Aaron v. State of Alabama, 43 Ala. App. ——, 192 So. 2d 456, at 457, did reject this Honorable Court's findings in Hill v. Holman, D.C.,

255 F. Supp. 924, primarily, chronologically, because the that case (Hill) was not taken to the Supreme Court of the United States; however, on the other hand and in the same case (Aaron)—the Court of Appeals of Alabama did literally pounce upon and accepted a lesser authority, i.e., the Supreme Court of North Carolina, when the same Patton case, supra, was before that Court—and did also accept an equally authoritative Court as this Honorable Court, i.e., a U. S. District Court in North Carolina, in its findings of law in the same Patton case when the case was before that Court, Patton v. State of North Carolina, D.C., 256 F. Supp. 225,—while the whole time being well aware of the obvious fact that the same Patton case had never been taken to the Supreme Court of the United States in either of those instances.

Judicially, in the future, it will be equally as interesting to see whether the appellate Court(s)[1] of Alabama will accept the very latest, by a higher authority, findings in the same Patton case; or will they reject the latest findings primarily because the latest findings in the same Patton case has not been taken to the Supreme Court of the United States; and/or primarily because the latest Patton findings does not serve their purpose—which obviously seems to be a paradoxical reluctance to dispense to prisoners of Alabama even an infinitesimal amount of due process of law—petitioner submits the latter to be more factually than it is intended to be facetious or disrespectful in light to the appellate Courts attitude in respect to

[1] The term "Court(s)" as used throughout petitioner's argument is intended to be applicable in the 'plural tense' only where the findings quoted from the cases of Aaron, supra, and Merkes, supra, has been before both appellate Courts of the State of Alabama.

'credit for prior time' as exhibited in the case of Ex parte Merkes, March 1967, 198 So. 2d 789, at 790, when the Court said:

> "We see no reason to go into what should be the rule of credit for prior time UNTIL WE HAVE TO." (Emphasis added.)

Petitioner submits that this Learned Court's findings in the case of Hill v. Holman, D.C., 255 F. Supp. 924, that: "The constitutional requirements of due process will not permit the State of Alabama to require Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit Court." has been held to be judicially sound by at least two federal circuit Courts, involving three instances, in the cases cited in the foregoing outset of this argument.

In light of the foregoing argument it is petitioner's position that he was illegally sentenced by the Circuit Court of Pike County, Alabama, in violation of the Constitution of the United States.

First, to eliminate the circuit Courts of Alabama, whether they would have jurisdiction by trial or venue, from the part they constitute in petitioner's allegation that the State Courts of Alabama does not afford, thus denying, him an effective and/or corrective post conviction remedy to adjudicate his specific claim of constitutional violation, it suffices to say to this Honorable that it is established judicial procedure, and acknowledged, that the several circuit Courts, trial or jurisdictional, within a State, Alabama being no exception, are judicially bound by the rulings articulated by their respective State's appellate Court or Courts; therefore, it is judicially obviously that this petitioner is judicially foreclosed and barred in his trial circuit

Court in any attempt by him to seek redress upon his specific claim of constitutional violation by the post conviction remedy of 'coram nobis' as practiced in Alabama, or by the remedy of 'modification of sentence' as practiced in Alabama by the rulings articulated by the appellate Court(s) of Alabama in the two recent cases of Aaron v. State of Alabama, Nov. 1966, 43 Ala. App. ——, 192 So. 2d 456; and Ex parte Merkes, March 1967, 198 So. 2d 789, cert. den. 198 So. 2d 790. Moreover, the same judicial proposition forecloses and bars any attempt by petitioner to seek redress in his jurisdictional circuit Court by the post conviction remedy of 'habeas corpus' as practiced in Alabama by the rulings articulated by the appellate Court(s) in the immediate above cited cases.

In Aaron, supra, a habeas corpus case on appeal, the applicant sought in his jurisdictional circuit Court, and coincidentally his trial circuit Court also, to obtain 'credit for prior time' he had served on his original sentence after original conviction and sentence had been set aside upon claim of constitutional violation and he was re-tried and sentenced the second time, the Court of Appeals of Alabama after citing the provisions of Alabama habeas corpus statutes[2] made the following findings and judicial conclusions of Alabama procedure and law, at 461:[3]

> "We pretermit "the dead time" question as not being either PROCEDURALLY or evidentially before us." (Emphasis added.)

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[2] Title 15, Sec. 27 and 28, Code of Alabama 1940.

[3] This is the only quotation from the Aaron, supra, case, cited by petitioner, that is not reiterated in the Ex parte Merkes, supra; the latter having been before both appellate Courts of Alabama.

In the immediate above cited quotation petitioner is only directing this Honorable Court's attention to the procedural aspect of the Aaron case and not to the evidential aspect, as the Aaron case and the instant case are not at all similar evidentially.

And at 460, in Aaron the Court held:

> "Moreover, WE DO NOT THINK THAT ALABAMA AFFORDS, after motion for new trial where in the trial judge's power over judgment is kept alive, ANY POST CONVICTION REMEDY TO assert that a sentence is invalid because of a CLAIM OF EXCESSIVENESS if the second sentence does not go beyond the statutory limit. Isbell v. State, 42 Ala. App. 498, 169 So. 2d 27. OUR SUPREME COURT HAS FAILED TO ADOPT any general rule that OUR REMEDY OF CORAM NOBIS AUTOMATICALLY ASSIMILATES ALL RIGHTS imposed on state trials by the Fourteenth Amendment." (Emphasis added.)

Petitioner submits that in light of the judicial findings and conclusions of procedure and law, as practiced in Alabama, articulated by the Court in Aaron, supra, it is judicially conclusive that the constitutional claim of 'credit for prior time' and the constitutional claim of 'excessiveness of second sentence' cannot be adjudicated effectively and/or correstively by the post conviction remedies of Habeas Corpus and Coram Nobis in the State Courts of Alabama.

• • •

In the case of Ex parte Merkes, 198 So. 2d 789, cert. den. 198 So. 2d 790, a 'modification of second sentence' case on appeal, the applicant sought in his trial circuit Court to obtain 'credit for prior time' served on original sentence

after his original conviction and sentence had been set aside on claim of constitutional violation and he was retried and sentenced the second time, whereupon the appellate Court(s) of Alabama did make the following judicial findings and conclusions of procedure and law, as practiced in Alabama, at 789, 790, the Court held:

> "(1, 2) First Merkes did not make this request to the trial Court in time. Since it is a one county circuit, Code 1940, T. 13, Sec. 119, ends its power of the Baldwin County Circuit Court over its judgments thirty days after rendition. This time limit cannot be changed. Boutwell v. State, 278 Ala. 176, 183, So. 2d 774."

> "(3) Second, after the time in which the trial judge can set aside judgment has gone by, THERE IS NO STATE COURT ACTION in which to make the claim on which Merkes is trying to have the circuit Court now act. (Emphasis added.)

And at 790:

> "Moreover, WE DO NOT THINK THAT ALABAMA AFFORDS, after motion for new trial wherein the trial judge's power over judgment is kept alive, ANY POST CONVICTION REMEDY to assert that a sentence is invalid because of A CLAIM OF EXCESSIVENESS if the second sentence does not go beyond the statutory limit. Isbell v. State, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court HAS FAILED TO ADOPT any general rule that OUR REMEDY OF CORAM NOBIS AUTOMATICALLY ASSIMILATES ALL RIGHTS imposed on state trials by the Fourteenth Amendment." (Emphasis added.)

With due respect petitioner submits and emphasizes at this point that the latter, immediately above, cited quotation was cited in Aaron, supra, some months prior to the time the same findings were articulated in Merkes, supra, and even farther back in Isbell v. State, cited in the above quotation; therefore, it is very strange but unfortunately true that the appellate Courts of Alabama have for some period of time readily admitted that 'Alabama has no post conviction remedy or other State Court action to assert that a sentence is invalid because of a claim of excessiveness and that coram nobis does not automatically assimilates all rights, nor is there any State Court action in which to assert the claim of 'prior time' served on original sentence, but yet has made no effort and has not shown any inclination to rectify the existing situation—notwithstanding the fact that the appellate Courts are duty bound to uphold the, among other things, Constitution of the United States. Petitioner further submits that the appellate Courts of Alabama when they exhibited the attitude they did in respect to prior time, as quoted from Merkes, supra, and cited on page iii of this argument, that the presumption is great enough, uniformly correlated with other appellate conclusions, that the same attitude is also applicable to petitioner's position that the appellate Courts of Alabama does not intend to assure its prisoners of their constitutional rights until they have to—the findings and conclusions articulated by the said appellate Courts of Alabama shown hereinabove and hereinafter does, indeed, for all judicial purposes suggest exactly that.

The findings and conclusions of Alabama procedure and law articulated by the appellate Courts of Alabama in Merkes, supra, a case where the remedy of 'modification of sentence' is conclusively eliminated by Alabama statute,

the allegation that 'Coram Nobis' is not applicable and available to petitioner is further supported by ruling the Court articulated in Merkes, at 790:

> "Even were we to take Merkes's petition as one for a writ of error coram nobis, under Ex parte Jenkins, 38 Ala. App. 117, 76 So. 2d 858, we do not consider it to make out any "error of law apparent on the transcript" as Code 1940, T. 15, Sec. 383, puts the limit on that writ.

In further support, insofar as 'coram nobis' is eliminated as a post conviction remedy to adjudicate petitioner's specific claim of constitutional violation, petitioner submits that since Alabama Courts first adopted 'coram nobis' as a post conviction remedy there has been, by Alabama state Courts, rulings too numerous to cite that holds 'coram nobis, is only available when there is an error of law apparent on the transcript that would render the conviction void; in the case at bar the petitioner does not, and rightly so, allege that his specific claim of constitutional violation renders his conviction void—which in itself would eliminate the applicability and availability, under Alabama law, of 'coram nobis' in his trial circuit Court to adjudicate petitioner's specific claim of constitutional violation.

Petitioner further submits that in light of the foregoing judicial findings and conclusions, uniformly correlated, articulated by the appellate Courts of Alabama that this Learned Court can without any hesitancy agree with the above mentioned Court(s) when they said: " . . . . we do not think that Alabama affords. . . . any post conviction remedy to assert that a sentence is invalid because of excessiveness. . . . ". It is also petitioner's position that this Learned Court can agree with the petitioner in the instant

case that he cannot, in the State Courts of Alabama, possibly adjudicate his specific claim of constitutional violation neither the remedy of (a) habeas corpus, (b) modification of sentence, or (c) coram nobis; thus the State Courts of Alabama denys him an effective and/or corrective post conviction to adjudicate his specific claim of constitutional violation in violation of the Constitution of the United States.

It is petitioner's position that in light of the overall, correlated and foregoing argument brings forth, with much significance, the following question: How much longer are the State Courts of Alabama going to be permitted to proceed with their continuity of non-compliance with the principle of law articulated as far back as 1935 by the highest Court of the land in the case of Mooney v. Holohan, 294 U.S. 103?; there the Supreme Court of the United States held that the several States must provide its prisoners with and effective to adjudicate their claims of constitutional violation. Again in 1949 in the case of Young v. Ragen, 337 U.S. 235, 69 S.Ct. 1073, 93 L. Ed. 1333, reiterated the same priniciple of law presented in the Mooney case; and once again in 1965 in the case of Case v. Nebraska, 381 U.S. 336, 85 S.Ct. 1486, the Supreme Court of the United States reiterated the same principle of law as presented in Mooney, and Young, and did elaborate by holding that when a State does afford a post conviction remedy that the Court presupposes that the remedy be an effective remedy to adjudicate its prisoner's claims of constitutional violation.

Allegation No. 8.

In order not to burden this Honorable Court with any lengthy argument in support of this (No. 8) allegations petitioner incorporates, by reference, the foregoing overall

argument heretobefore presented and submits that he has shown unto this Honorable Court that he is factually and judicially denied of an effective and/or corrective post conviction remedy to adjudicate his specific claim of constitutional violation in the State Courts of Alabama; hence, his cause in the case at bar comes squarely within the 'exceptional circumstances' provision of Title 28, Sec. 2254, United States Code; that his petition for federal habeas corpus at this time is not an attempt to bypass the exhaustive principle pursuant to the same above cited federal statute; thus this Honorable Court's jurisdiction to adjudicate petitioner's instant cause is lawfully invoked.

In further support the petitioner submits that his position is that his predicament is analogous with the applicant in the case of Bell v. Alabama, —— F. 2d ——, Sept. 1966, an 'exceptional circumstances' case, insofar as the applicant there had no Court to resort to except to his federal district Court of jurisdiction; likewise, this petitioner has no Court to resort to except to this Honorable Court to seek redress upon his specific claim of constitutional violation. Also see Frishi v. Collins, Mich. 1952, 72 S.Ct. 509, 342 U.S. 519, 96 L. Ed. 541, rehearing denied 72 S.Ct. 728, 343 U.S. 937, 96 L. Ed. 1344; and Bacom v. Sullivan, C.A., Fla. 1952, 194 F. 2d 166. Moreover, should petitioner in the case at bar be forced to pursue a non-existing post conviction remedy through the State Courts of Alabama he only be caused frustration, despair and further deprivation of his liberty.

It is petitioner's concluding position that, by his foregoing argument in its entirety, he has conclusively shown this Honorable Court sufficient cause for this Court to lawfully invoke its jurisdiction and to adjudicate the instant

case at this time, to sustain the writ of habeas corpus, and to order petitioner's forthwith discharge.

Respectfully submitted,

WILLIAM S. RICE,

Route 3—Box 115,
Montgomery, Alabama.

[Certification Omitted in Printing]

Return and Answer and, in the Alternative, Motion to Dismiss of Respondent

[Filed August 3, 1967]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

(Title Omitted in Printing)

Comes now your Respondent, Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama, by and through the Attorney General of Alabama, MacDonald Gallion, and Assistant Attorney General, Paul T. Gish, Jr., and, in answer to the order to show cause heretofore issued by this Honorable Court, on July 17, 1967, does herewith submit the following:

1. Petitioner is lawfully confined in Kilby Prison, Montgomery, Alabama, by virtue of the judgment of the Circuit Court of Pike County, Alabama, rendered on May 19, 1965, and the sentence imposed by said Circuit Court on said date in Case No. 6430.

2. On February 16, 1962, petitioner entered pleas of guilty in the Circuit Court of Pike County, Alabama, in Cases Numbered 6427, 6428, 6429 and 6430, and he was adjudged guilty by said Circuit Court in each of said cases. In Case No. 6427 said Circuit Court sentenced the petitioner to serve a term of four years in the State penitentiary. In each of the other cases, petitioner was sentenced to serve a term of two years in the penitentiary.

3. On August 28, 1964, the Circuit Court of Pike County, Alabama, granted an application for writ of error coram nobis filed by the petitioner in said Court and set aside the judgments and sentences in each of the cases mentioned in the preceding paragraph. (See Exhibit "A", attached hereto and made a part hereof.)

4. On December 3, 1964, petitioner was tried by a jury in Cases Numbered 6427 and 6428, and upon a verdict of guilt the Court sentenced the petitioner to serve a prison term of ten years in each of these cases. (See Exhibits "B" and "C", attached hereto and made a part hereof.)

5. An appeal was taken by the petitioner to the Court of Appeals of Alabama from the judgments of conviction in each of the cases mentioned in the preceding paragraph, and these cases were affirmed by said Court on December 5, 1965.

6. On May 19, 1965, the Circuit Court of Pike County, Alabama, entered a judgment of nolle prosequi, in Case Number 6429 wherein the petitioner was accused of the crime of burglary in the second degree. (See Exhibit "D", attached hereto and made a part hereof.)

7. On May 19, 1965, petitioner was convicted upon his plea of not guilty by a jury in Case Number 6430, and sentenced by the Circuit Court of Pike County, Alabama, to a prison term of five years in said case. (See Exhibit "E", attached hereto and made a part hereof.)

8. No appeal was taken by the petitioner from his conviction in Case Number 6430, and he immediately began serving his sentence in said case.

9. One of the reasons that a judgment of nolle prosequi was entered in Case Number 6429 by the Circuit Court of Pike County, Alabama, on May 19, 1965, was the fact that petitioner had already served a part of his sentences imposed upon him on February 16, 1962, prior to his discharge from prison upon the granting of his petition for writ of error coram nobis. (See Exhibit "F", attached hereto and made a part hereof.)

10. At the time petitioner's application for writ of error coram nobis was granted in all cases in which he had been convicted no judgment existed upon which the prison authorities could give the petitioner credit for the time which had been served in prison.

11. Petitioner has not exhausted all remedies available to him in the Courts of the State of Alabama.

12. Respondent denies each and every allegation set forth in the petition heretofore filed in this cause.

Wherefore, The Premies Considered, the Respondent, by and through the Attorney General of Alabama, respectfully requests this Honorable Court to grant this, its motion to dismiss, and to determine that the Respondent has shown good cause why the petition should be denied.

Respectfully submitted,

MacDonald Gallion,
Attorney General,

Paul T. Gish, Jr.,
Assistant Attorney General,

Attorneys for Respondent.

EXHIBIT "A"

State of Alabama

Board of Corrections

July 24, 1967

To Whom it May Concern:

Re: Rice, William Stewart, Ala: #82899.

This Is To Certify That The Above Named Subject Was Sentenced From Pike County on 2-16-62, Cases #6427, 8, 9, 30 for 4 cases of burglary, terms, 4 years in first case and 2 years on each 2nd, 3rd, and fourth. Subject was discharged by Court Order on 8-28-64.

Subject was re-sentenced from Pike County Circuit Court, Cases #6427, 8, on 12-3-64 for burglary, term 10 years each case. (2 cases.)

Appealed, 12-3-64 and affirmed 12-5-65 by Alabama Court of Appeals.

Re-sentenced on Case #6430, Pike County Circuit Court, burglary, term, 5 years on 5-18-65.

Subject serving on Case #6430 with Cases #6427 to be served at expiration, and Case #6428 at expiration of Case #6427.

Done this 24th day of July, 1967.

MILFORD S. DEAN,
(Milford S. Dean),
Record & Ident. Officer.

(Seal)

Sworn to and subscribed before me this the 26th day of July 1967.

W. L. BATTLE,
Notary Public.

My Commission Expires 13 Dec. 1970.

EXHIBIT "B"

(See opposite) ☞

INDICTMENT

The State of Alabama, PIKE County

Circuit Court SPRING - Term, 19 62

The Grand Jury of said County charge that before the finding of this indictment: .....
William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did, with the intent to steal, break into and enter a shop, store orwarehouse, theproperty of Gamaliel P. Green in which goods, wares or merchandise, things of value, were kept for use, sale ordeposit,

The State of Alabama, PIKE County

Circuit Court SPRING Term, 19 62

The Grand Jury of said County charge that before the finding of this indictment:
William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did, with the intent to steal, break into and enter a shop, store orwarehouse, theproperty of Gamaliel P. Green in which goods, wares or merchandise, things of value, were kept for use, sale ordeposit,

Exh - "B" - Page 1

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against the peace and dignity of the State of Alabama.

Kenneth T. Fuller
Solicitor of the Twelfth Judicial Circuit.

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No.

The State of Alabama
PIKE COUNTY

CIRCUIT COURT

Spring Term, 1962

THE STATE

vs.

William Stewart Rice

OFFENSE:

Burglary

INDICTMENT

Witnesses:

Grand Jury No. 43

A TRUE BILL:

William Howell

Foreman Grand Jury.

Filed in open Court on the 13 day of Feb., 1962

in the presence of the Grand Jury.

Robert Nunnery Jr.

Clerk.

Presented to the presiding Judge in open Court by the Foreman of the Grand Jury, in the presence of 17 other Grand Jurors, and filed by order of Court this 13 day of Feb., 1962

Robert Nunnery Jr.

Clerk.

It is ordered that the Clerk issue Capias for this named defendant and that the sheriff arrest the defendant and commit the defendant to Jail unless the defendant give bail in the sum of $ 500.00

Eric Ford

Judge

TROY PTG. CO., TROY, ALA

Service of Copy of Indictment and List of Jurors on Defendant in Capital Case. 7840 Code.

The State of Alabama,
PIKE COUNTY

Circuit Court, _____ Term, 19____

I, _____

Clerk of the Circuit Court in and for Pike County, Alabama, do hereby certify that the within and foregoing is a true, correct and exact copy of the Indictment returned by the Grand Jury of said County, against the within named Defendant.

Witness my hand and seal of office, this the _____ day of _____

19____.

_____ Clerk.

I Robert Nunnery, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above styled cause, which is on file and enrolled in my office.

Witness my hand and seal this the 13 day of Feb., 1962

Robert Nunnery Jr.
Clerk & Register

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COMPLAINT AND WARRANT OF ARREST — Troy Printing Co., Troy

The State of Alabama,
PIKE COUNTY

Before me Hugh Starling Justice of the Peace for said County, personally appeared W.S.Furlow, As Sheriff Pike County, Alabama who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County, within twelve months before making this affidavit, William Stewart Rice, Alias

Def with intent to steal broke into and entered Gravis Drug Store (House) in which goods Wares Merchandise & other Valuable things are kept for use Sale or Deposit.

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5th day of February 19 62

Hugh Starling J. P.

W.S. Furlow

The State of Alabama
PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Alias

and bring before me Hugh Starling J.P.

to answer the State of Alabama of a charge of Burglary

Preferred by W.S.Furlow, As Sheriff Pike County, Alabama

Witness my hand this 5th day of February 19 62

Hugh Starling
Justice of the Peace

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama do hereby certify the foregoing to be a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office. Witness my hand and seal this the 3rd day of July, 1962.

Robert Newman Jr.
Clerk & Register

Exh. "B" Page 2.

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RECEIVED IN OFFICE February 5th 19 62

Pat McLemore Sheriff

I have executed this warrant this 5th day of February 19 62 by arresting the within named defendant and bringing him before the Justice Court of Pike County, Alabama, on the 7th day of February 19 62

Pat McLemore Sheriff

Deputy Sheriff

No. 43 Page

The State of Alabama,
PIKE COUNTY

JUSTICE COURT OF

Hugh Starling

THE STATE OF ALABAMA

vs.

William Stewart Rice, Alias

COMPLAINT AND WARRANT OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of $750.00 DOLLARS

Hugh Starling J. P.

STATE WITNESSES

Gamaliel P Green

Deta Jack Shows

Deta D.D.Collins

Lieut. John Williams

J.Q.Parker

Curtis Bull

State Toxicologist Finley

Fees Returned

Pat McLemore

The State of Alabama,
PIKE COUNTY

IN THE _____ COURT OF
PIKE COUNTY, ALABAMA

NO. _____

THE STATE OF ALABAMA,
vs.

_____

Before me _____

Pike County, Alabama, personally appeared _____

_____ who being duly sworn deposes and says:

I am t[illegible] She.

In th[illegible]

_____

I or one of my

I am entitled to mileage at ten cents per mile to be taxed as costs in the case.

_____

Subscribed and sworn to before me, this _____ day of _____ 19 __

_____ _____

Disposition of Case

After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court, hereby approve the claim for mileage in the sum of $_____ incurred in the making of the arrest or executing the Warrant of Arrest in the above styled cause and I hereby order the Clerk of the Court to tax the said sum as part of costs in the case.

This the _____ day of _____ 19 __

_____

Judge of the above named Court.

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STATE TRIAL DOCKET

CASE NO

CIRCUIT COURT OF PIKE COUNTY

FEE BOOK.....P

Ptg. Co. Mobile.

ATTORNEYS	PARTIES	CHARGE	SHERIFF
enneth T. Fuller	THE STATE vs. William Stewart Rice	Burglary	2-13-6

Date of Orders Mo.	Day	Year	ORDERS OF COURT
2	16	62	Dft Ars Arraignment in Open Court Pleads Guilty as Charged in Indictment Formally Adjudged Guilty and is Sentenced to Penitentiary of Alabama for 4 Years.
11	5	64	Defendant before being arraigned was asked the following questions, Have you employed Counsel or have you made arrangements to be represented, assisted and defended by Counsel in this case? Answer. No Are you financially able to employ an Attorney to represent, assist and defend you in this case? Answer. No, Do you desire the Court to appoint an Attorney to represent, assist and defend you in this case? Answer. Yes, It appearing to the satisfaction of the Court that Defendant in this case is indigent and desires legal Counsel, it is ordered and adjudged by the Court that Jackson W. Stokes, a practicing Attorney in this Court, be and he is hereby appointed as Counsel to represent, assist and defend Defendant in this case. _____ Judge

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.
Witness my hand and seal this the 25 day of July 1962

Robert Newman
Clerk & Register

Exh- "B" Page 3.

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6427 State VS. William Stewart Rice

PAGE NO.

Date of Orders Mo.	Day	Year	ORDERS OF COURT	Minute Book Volume	Page
11	5	64	Defendant being present in open Court with counsel, on arraignment pleads not guilty to the charge and each charge embraced in the Indictment. His case is set for trial Dec 2 19 64. This the 5 day of Nov. 1964. Judge		
12	3	64	Jury and Verdict finding Dfndant guilty as charged in the indictment. Verdict ordered in Record & Dft and Court read the Verdict to Dft and delayed sentencing until a later time on this Day (12/3/64)		
12	3	64	On Jury Verdict, Dft. is adjudged sentenced to imprisonment in the Penitentiary of Alabama for 10 years. Dft gives Notice of Appeal. Execution of Sentence suspended Pending appeal. Bond fixed at $500.00 Jackson W Stokes is appointed to represent Dft. on appeal.		

D. 496

INDICTMENT

The State of Alabama, PIKE County

Circuit Court SPRING Term, 1962

The Grand Jury of said County charge that before the finding of this indictment:

William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did with the intent to steal, break into and enter a shop, store or warehouse, the property of The Central of Georgia Railway Co., a corporation, in which goods, wares, or merchandise, things of value, were kept for use, sale or deposit,

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against the peace and dignity of the State of Alabama.

Kenneth F. Fuller

Solicitor of the Twelfth Judicial Circuit.

Exh- "C" Page 1

EXHIBIT "C"

33

No.

The State of Alabama

PIKE COUNTY

CIRCUIT COURT

Spring Term, 19 62

THE STATE

vs.

William Stewart Rice

OFFENSE:

Burglary

INDICTMENT

Witnesses:

Grand Jury No. 44

A TRUE BILL:

William Stewart

Foreman Grand Jury.

Filed in open Court on the 13 day of Feb., 1962

in the presence of the Grand Jury.

Robert Newman Jr.

Clerk.

Presented to the presiding Judge in open Court by the Foreman of the Grand Jury, in the presence of 12 other Grand Jurors, and filed by order of Court this 13 day of Feb., 1962

Robert Newman Jr.

Clerk.

It is ordered that the Clerk issue Capias for this named defendant and that the sheriff arrest the defendant and commit the defendant to Jail unless the defendant give bail in the sum of $ 500

Eris K. Hunt

Judge.

TROY PTG. CO., TROY, ALA.

Service of Copy of Indictment and List of Jurors on Defendant in Capital Case. 7840 Code.

The State of Alabama,

PIKE COUNTY

Circuit Court, Term, 19

I, Clerk of the Circuit Court in and for Pike County, Alabama, do hereby certify that the within and foregoing is a true, correct and exact copy of the Indictment returned by the Grand Jury of said County, against the within named Defendant.

Witness my hand and seal of office, this the day of 19

Clerk.

I, Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in my office, stated cause, which is on file and recorded in my office. Witness my hand and seal this the 13 day of Feb. 1962

Robert Newman Jr.
Clerk & Register

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Writ of Arrest — TROY PTG. CO., TROY, ALA.

The State of Alabama, Pike County

CIRCUIT COURT

TO ANY SHERIFF OF THE STATE OF ALABAMA---GREETING:

An indictment having been found against Wm. Stewart Rice

at the Spring Term, 19 62, of the Circuit Court of Pike

County, for the offense of Burg.

you are therefore commanded forthwith to arrest Wm. Stewart Rice

and commit him to jail, unless he give bail to answer such indictment at the next term of our Circuit Court, to be holden for said County, on the Monday in next, and make return of this writ, according to law.

Witness this 13th day of Febry. 19 62

Robert Newman, Jr., Clerk

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.
Witness my hand and seal this the 25 day of July 1962

Robert Newman, Jr.
Clerk & Register

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Exh - "C" Page 2.

No. 44

The State of Alabama

PIKE COUNTY

CIRCUIT COURT

THE STATE

vs.

Wm. Stewart Rice

WRIT OF ARREST

Issued this 13th day

of Feby., 19 62

W. A. Hamm

Clerk

Bail $500.00

TROY PTG. CO., TROY, ALA.

Received in Office

2/13 19 62

W. L. Lucas, Sheriff

Executed by arresting the within named Defendant, and Cooper Dees Jail

Feb 13th 19 62

W. L. Lucas, Sheriff

We the Jury, find the Defendant Guilty as Charged

William Cox

Foreman

COMPLAINT AND WARRANT OF ARREST — Troy Printing Co., Troy

The State of Alabama,
PIKE COUNTY

Before me Hugh Starling Justice of the Peace

for said County, personally appeared W.S.Furlow, As Sheriff Pike County, Alabama

who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County, within twelve months before making this affidavit William Stewart Rice, Alias

Did With intent to Steal break into and entered the Central of Georgia Railway Co Freight Station In which goods, Merchandise or other Valuable thing Was Kept for use Sale or Deposit.

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5th day of February 19 62

Hugh Starling J. P.

W S Furlow

The State of Alabama
PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Alias

and bring before me Hugh Starling, J.P.

to answer the State of Alabama of a charge of Burglary

Preferred by W.S.Furlow, As Sheriff Pike County, Ala

Witness my hand this 5th day of February 19 62

Hugh Starling
Justice of the Peace

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Exh. "C" Page 3.

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No. 44 Page

The State of Alabama,

PIKE COUNTY

JUSTICE COURT OF

Hugh Starling

THE STATE OF ALABAMA

William Stewart Ross, Alias

COMPLAINT AND WARRANT OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of

$750.00 DOLLARS

Hugh Starling J. P.

STATE WITNESSES

Walter M Duke

Det. Jack Shows

Det. D.D.Collins

Lieut. John Williams

J.Q.Parker

Curtis Bull

State Toxicologist Finley

~~Jeff Redmond~~

W H Tuner

RECEIVED IN OFFICE

February 5th 62

W H Tuner Sheriff

I have executed this warrant this 5th

February 19 62

by arresting the within named defendant and

Bringing Him

before Hugh Starling

J.P. and Committing

Him to Jail in

Default Bail

W H Tuner

Sheriff

Deputy Sheriff

IN THE COURT OF

THE STATE OF ALABAMA, PIKE COUNTY

vs.

I, Robert Newman, Jr. Clerk of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and recorded in my office. Witness my hand and seal this the 23rd day of July 1962

Robert Newman
Clerk & Register

The State of Alabama,
PIKE COUNTY

NO.

THE STATE OF ALABAMA,
vs.

Before me, _____ who being duly sworn deposes and says:

Pike County, Alabama, personally appeared _____

I am the Sheriff of Pike County, Alabama.

In the case of the State of Alabama vs. _____

in the above mentioned Court, in executing the Warrant of Arrest or in arresting the said Defendant, I or one of my duly authorized Deputies traveled _____ miles by the most direct route to the point of arrest and return, and I am entitled to mileage at ten cents per mile to be taxed as costs in the case.

Subscribed and sworn to before me, this _____ day of _____ 19 —

Disposition of Case

After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court, hereby approve the claim for mileage in the sum of $_____ incurred in the making of the arrest or executing the Warrant of Arrest in the above styled cause and I hereby order the Clerk of the Court to tax the said sum as part of costs in the case.

This the _____ day of _____ 19 —

Judge of the above named Court.

STATE TRIAL DOCKET

6420

CASE NO. 642

CIRCUIT COURT OF PIKE COUNTY FEE BOOK ..... PAGE .....

Co. Mobile:

ATTORNEYS	PARTIES	CHARGE	SHERIFF'S RETURN
nneth T. Fuller	THE STATE	Burglary	2-13-62
	vs.		
	William Stewart Rice		

of Orders Day	Year.	ORDERS OF COURT	Minute B. Volume
16	62	Deft. on arraignment in open court pleads guilty as charged in indictment. Formally adjudged guilty and is sentenced to penitentiary of Alabama for 2 years. Eris Freel Circuit Judge.	
3-64		Defendant before being arraigned was asked the following questions. Have you employed Counsel or have you made arrangements to be represented, assisted, and defended by Counsel in this case? Answer. No. Are you financially able to employ an Attorney to represent, assist and defend you in this case? Answer. No. Do you desire the Court to appoint an Attorney to represent, assist and defend you in this case? Answer. Yes. It appearing to the satisfaction of the Court that Defendant in this case is indigent and desires legal Counsel, it is ordered and adjudged by the Court that Jackson W. Stokes, a practicing Attorney in this Court, be and he is hereby appointed as Counsel to represent, assist and defend Defendant in this case. Eris Freel Judge	

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office. Witness my hand and seal this the 25 day of July 1962

Robert Newman Jr.
Clerk & Register

Exh "C" Page 4.

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6428

PAGE NO.

Date of Orders Mo.	Day	Year	ORDERS OF COURT	Minute Book Volume	Page
11	5	64	Defendant being present in open Court with counsel, on arraignment pleads not guilty to the charge and each charge embraced in the indictment. His case is set for trial Dec. 2 1964. This the 5 day of Nov. 1964. Eric Fuller Judge		
12	3	64	Jury and Verdict finding Defendant guilty as Charged. As Jury Verdict Def is sentenced to the Penitentiary of Alabama for 10 years.	12	428-493

INDICTMENT

The State of Alabama, PIKE County

Circuit Court SPRING Term, 19 62

The Grand Jury of said County charge that before the finding of this indictment:
William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did, with the int ent to steal, break into and enter a shop, store or warehouse, the property of N. Randall Phillips, in which goods, wares or merchandise, things of value were kept for use, sale or deposit,

"Exh. "D" Page 1

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against the peace and dignity of the State of Alabama.

Kenneth F. Fuller
Solicitor of the Twelfth Judicial Circuit.

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EXHIBIT "D"

No.

The State of Alabama
PIKE COUNTY

CIRCUIT COURT

Spring Term, 1962

THE STATE

vs.

William Stewart Rice

OFFENSE:

Burglary

INDICTMENT

Witnesses:

Grand Jury No. 45

A TRUE BILL

Wilburn Howell

Foreman Grand Jury.

Filed in open Court on the 13 day of Feb., 1962 in the presence of the Grand Jury.

Robert Newman Jr.

Clerk.

Presented to the presiding Judge in open Court by the Foreman of the Grand Jury, in the presence of 17 other Grand Jurors, and filed by order of Court this 13 day of Feb., 1962

Robert Newman Jr.

Clerk.

It is ordered that the Clerk issue Capias for this named defendant and that the sheriff arrest the defendant and commit the defendant to Jail unless the defendant give bail in the sum of $ 500.00

Judge.

Service of Copy of Indictment and List of Jurors on Defendant in Capital Case. [illegible] 0 Code.

The State of Ala[illegible]

PIKE COUNT

Circuit Court, _____ 9____

I, _____ _____ Coun-
Clerk of the Circuit Court in [illegible] within
ty, Alabama, do hereby certi[illegible] t copy
and foregoing is a true, cor[illegible] d Jury
of the Indictment returned [illegible] ed De-
of said County, against th[illegible]
fendant.

Witness my hand and [illegible] this the

_____ day of _____ _____.

19____

_____, Clerk.

I Robert Newman, Jr. Clerk & Register of the Circuit Court of Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and recorded in my office.
Witness my hand and seal this the 31 day of Oct. 1962

Robert Newman Jr.

Clerk & Register

TROY PTG. CO., TROY, ALA.

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Writ of Arrest

TROY PTG. CO., TROY, ALA.

The State of Alabama, Pike County

CIRCUIT COURT

TO ANY SHERIFF OF THE STATE OF ALABAMA--GREETING:

An indictment having been found against Wm. Stewart Rice

at the Spring Term, 19 62, of the Circuit Court of Pike

County, for the offense of Burg.

you are therefore commanded forthwith to arrest Wm. Stewart Rice

and commit him to jail, unless he give bail to answer such indictment at the next term of our Circuit Court, to be holden for said County, on the Monday in next, and make return of this writ, according to law.

Witness, this 13th day of Feby, 19 62

Robert Newman Jr., Clerk

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and recorded in my office.
Witness my hand and seal this the 25 day of Feby 1962.

Robert Newman Jr.
Clerk & Register

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Exh- "D" Page 2

No. 45

The State of Alabama

PIKE COUNTY

CIRCUIT COURT

THE STATE

vs.

Wm. Stewart Rice

WRIT OF ARREST

Issued this 13th day

of Febt. 19 63

Robert Merriman Jr

Clerk

Bail $500.00

TROY PTG. CO., TROY, ALA.

Received in Office

Feb 13 19 63

W. A. Tarver, Sheriff

Executed by arresting the within named Defendant, and Lodged in Jail

Feb 13th 19 63

W. A. Tarver, Sheriff

COMPLAINT AND WARRANT OF ARREST — Troy Printing Co., Troy

The State of Alabama,
PIKE COUNTY

Before me Hugh Starling Justice of the Peace

for said County, personally appeared W.S.Furlow, As Sheriff Pike County, Alabama

who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County, within twelve months before making this affidavit William Stewart Rice, Alias Dud Walk entered & stole break ins and entered the D Randall Phillips Distributor Amerison Oil Company Office and Warehouse in which goods & Merchandise was kept for Resale or Deposit.

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5th day of February 19 62

Hugh Starling J. P.

W.S.Furlow

The State of Alabama
PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Alias

and bring before me Hugh Starling, J.P.

to answer the State of Alabama of a charge of Burglary

Preferred by W.S.Furlow, As Sheriff Pike County, Alabama

Witness my hand this 5th day of February 19 62

Hugh Starling Justice of the Peace

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Exh. "D" Page 3

357

RECEIVED IN OFFICE

this ____ day of ____ 19__

____ Sheriff

I have executed this warrant this ____ day of ____ 19__ by arresting the within named defendant and ____

____ Deputy Sheriff

No. ____ Page ____

The State of Alabama,
PIKE COUNTY

JUSTICE COURT OF

Hugh Starling

THE STATE OF ALABAMA

vs.

William Stewart Rice, Alias

COMPLAINT AND WARRANT OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of

$750.00 DOLLARS

Hugh Starling J. P.

STATE WITNESSES

N Randall Phillips

Dot. Jack Shows

Det. D.D.Collins

Lieut. John Williams

J.O.Parker

Curtis Bull

State Toxicologist Finley

Jeff Richmond

The State of Alabama,
PIKE COUNTY

IN THE ____ COURT OF

PIKE COUNTY, ALABAMA

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office. Witness my hand and seal this the 25 day of July, 1962

Robert Newman
Clerk & Register

NO. ____

THE STATE OF ALABAMA

vs.

____

Before me ____

Pike County, Alabama, personally appeared ____, who being duly sworn deposes and says:

I am the Sheriff of Pike County, Alabama.

In the case of the State of Alabama vs. ____ in the above mentioned Court, in executing the Warrant of Arrest or in arresting the said Defendant, I or one of my duly authorized Deputies traveled ____ miles by the most direct route to the point of arrest and return, and I am entitled to mileage at ten cents per mile to be taxed as costs in the case.

____

Subscribed and sworn to before me, this ____ day of ____ 19__

____

Disposition of Case

After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court, hereby approve the claim for mileage in the sum of $____ incurred in the making of the arrest or executing the Warrant of Arrest in the above styled cause and I hereby order the Clerk of the Court to tax the said sum as part of costs in the case.

This the ____ day of ____ 19__

____

Judge of the above named Court.

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STATE TRIAL DOCKET

6429

CASE NC

CIRCUIT COURT OF PIKE COUNTY

FEE BOOK.....PA

Gulf Pkg. Co., Mobile.

ATTORNEYS	PARTIES	CHARGE	SHERIFF'S
Kenneth T. Fuller	THE STATE vs. William Stewart Rice	Burglary	2-13-62

Date of Orders Mo.	Day	Year	ORDERS OF COURT
2	16	62	Deft. on arraignment in open court pleads guilty as charged in indictment. Formally adjudged guilty and is sentenced to pententiary of Alabama for 2 years. Circuit Judge
11	5	64	Defendant before being arraigned was asked the following questions. Have you employed Counsel or have you made arrangements to be represented, assisted and defended by Counsel in this case? Answer. No. Are you financially able to employ an Attorney to represent, assist and defend you in this case? Answer. No Do you desire the Court to appoint an Attorney to represent, assist and defend you in this case? Answer. Yes. It appearing to the satisfaction of the Court that Defendant in this case is indigent and desires legal Counsel, it is ordered and adjudged by the Court that Jackson, a practicing Attorney in this Court, be and he is hereby appointed as Counsel to represent, assist and defend Defendant in this case. Judge

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.
Witness my hand and seal this the 24 day of Jan. 1964.

Robert Newman Jr.
Clerk & Register

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"Exh "D" Page 4.

CASE NO. 6129

State VS. William Stewart Rice

PAGE NO.

ORDERS OF COURT

Date of Orders			ORDERS OF COURT	Minute Book	
Mo.	Day	Year		Volume	Page
11	5	64	Defendant being present in open Court with counsel, on arraignment pleads not guilty to the charge and each charge embraced in the Indictment. His case is set for trial Dec. 2 19 64. This the 5 day of Nov. 1964. [illegible] Judge		
12	3	64	This cause is Continued on Motion of Deft Made in Open Court together With [illegible] Counsel		
5	14	65	On Motion of the State [illegible] Nol Prossed. [illegible]	[illegible]	

INDICTMENT

The State of Alabama, PIKE County

Circuit Court, Spring Term, 1962

The Grand Jury of said County charge that before the finding of this indictment: William Stewart Rice

Whose name is to the Grand Jury otherwise unknown. did, with theintent to steal, break into and enter a shop, store or warehouse, the property of Alabama Warehouse Company, Inc., a corporation, in which goods, wares, or merchandise, things of value, were kept for use, safe or deposit,

against the peace and dignity of the State of Alabama.

Kennett T. Fuller
Solicitor of the Twelfth Judicial Circuit.

Exh- "E" Page 1

EXHIBIT "E" 49

No. _____

The State of Alabama
PIKE COUNTY

CIRCUIT COURT

Sping Term, 1962

THE STATE

vs.

William Stewart Rice

OFFENSE:

Burglary

INDICTMENT

Witnesses:

Grand Jury No. 46

A TRUE BILL:

William Hewett

Foreman Grand Jury.

Filed in open Court on the 13 day of Feb., 1962

in the presence of the Grand Jury.

Robert Newman Jr.

Clerk.

Presented to the presiding Judge in open Court by the Foreman of the Grand Jury, in the presence of 17 other Grand Jurors, and filed by order of Court this 13 day of Feb., 1962

Robert Newman Jr.

Clerk.

It is ordered that the Clerk issue Capias for this named defendant and that the sheriff arrest the defendant and commit the defendant to Jail unless the defendant give bail in the sum of $ 7,500.00

J. E. D.

Judge.

I Robert Newman, Jr. Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.
Witness my hand and seal this the 25 day of July 1962

Robert Newman Jr.

Clerk & Register

Service of Copy of Indictment and List of Jurors on Defendant in Capital Case. 7840 Code.

The State of Alabama,
PIKE COUNTY

Circuit Court, _____ Term, 19____

I, _____

Clerk of the Circuit Court in and for Pike County, Alabama, do hereby certify that the within and foregoing is a true, correct and exact copy of the Indictment returned by the Grand Jury of said County, against the within named Defendant.

Witness my hand and seal of office, this the _____ day of _____,

19____.

_____, Clerk.

TROY PTG. CO., TROY, ALA.

COMPLAINT AND WARRANT OF ARREST — Troy Printing Co., Troy

The State of Alabama,
PIKE COUNTY

Before me Hugh Starling Justice of the Peace

for said County, personally appeared W.S.Furlow, As Sheriff Pike County, Alabama

who being duly sworn says on oath that he has probable cause for believing and does believe, that in Pike County,

within twelve months before making this affidavit William Stewart Rice, Alias

did with intent to steal break into and enter the Dobson Warehouse Co. Inc. In which goods, wares, Merchandise & other valuable things were kept for use Sale or Deposit.

against the peace and dignity of the State of Alabama.

Sworn to and subscribed before me, this 5th day of February 19 62

Hugh Starling J. P.

W.S. Furlow

The State of Alabama
PIKE COUNTY

To Any Lawful Officer of the State of Alabama, Greeting:

You are hereby commanded to arrest William Stewart Rice, Alias

and bring before me Hugh Starling, J.P.

to answer the State of Alabama of a charge of Burglary

Preferred by W.S.Furlow As Sheriff Pike County, Alabama

Witness my hand this 5th day of February 19 62

Hugh Starling
Justice of the Peace

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Exh. "E" Page 2

OFFICE

5th 19 62

______ Sheriff

[Exe]cuted this warrant on 5th

February 19 62

[by a]rresting the within named defendant and

bringing him

before Hugh Starling

and committing

him to jail in

default bail

[signature]

Sheriff

Deputy Sheriff

No. (46) Page ______

The State of Alabama,

PIKE COUNTY

JUSTICE COURT OF

Hugh Starling

THE STATE OF ALABAMA

vs.

William Stewart Rice, Alias

COMPLAINT AND WARRANT OF ARREST

The Officer Arresting may admit the Defendant to Bail in the sum of

$750.00 DOLLARS

Hugh Starling J. P.

STATE WITNESSES

J.E.Dean

Det. Jack Shows

Det. D.D.Collins

Lieut. John Williams

J.C.Parker

Curtis Bull

State Tox-ocolist Finley

~~Jeff Redmond~~

[signature]

The State of Alabama

PIKE COUNTY

NO.______

THE S[TATE] ______

IN THE ______ COURT OF

PIKE COUNTY, ALABAMA

I Robert Newman, Jr. Clerk & Register of the Circuit Court of Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.

Witness my hand and seal this the 22 day of ______ 1962

[signature]
Clerk & Register

Before me ______

Pike County, Alabama, personally appeared ______, who being duly sworn deposes and says:

I am the Sheriff of Pike County, Alabama.

In the case of the State of Alabama vs. ______

in the above mentioned Court, in executing the Warrant of Arrest or in arresting the said Defendant, I or one of my duly authorized Deputies traveled ______ by the most direct route to the point of arrest and return, and I am entitled to mileage at ten cents per mile to be taxed as costs in the case.

Subscribed and sworn to before me, this ______ day of ______ 19__

Disposition of Case

After considering the above affidavit made by the Sheriff of Pike County, Alabama, I, as the trial Judge of said Court, hereby approve the claim for mileage in the sum of $______ incurred in the making of the arrest or executing the Warrant of Arrest in the above styled cause and I hereby order the Clerk of the Court to tax the said sum as part of costs in the case.

This the ______ day of ______ 19__

______
Judge of the above named Court.

STATE TRIAL DOCKET

CASE NO. 6430

CIRCUIT COURT OF PIKE COUNTY

FEE BOOK ..... PAGE .....

ATTORNEYS	PARTIES	CHARGE	SHERIFF'S RETURN
h T. Fullxer	THE STATE	Burglary	2-13-62
	vs.		
	William Stewart Rice		

Orders Day	Year	ORDERS OF COURT	Minute Book Volume	Page
6	62	Deft. on arraignment in open court pleads guilty as charged in indictment. Formally adjudged guilty and is sentenced to pentientiary of Alabama for 2 years. Circuit Judge	D	32
6	62	Defendant before being arraigned was asked the following questions, Have you employed Counsel or have you made arrangements to be represented, assisted and defended by Counsel in this case? Answer. No. Are you financially able to employ an Attorney to represent, assist and defend you in this case? Answer. No. Do you desire the Court to appoint an Attorney to represent, assist and defend you in this case? Answer. Yes. It appearing to the satisfaction of the Court that Defendant in this case is indigent and desires legal Counsel, it is ordered and adjudged by the Court that Jackson W. Stokes, a practicing Attorney in this Court, be and he is hereby appointed as Counsel to represent, assist and defend Defendant in this case. Judge		

I Robert Newman, Jr. Clerk & Register of the Circuit Court in Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original document in the above stated cause, which is on file and enrolled in my office.
Witness my hand and seal this the 2nd day July 1962

Clerk & Register

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Elh - "E" Page 3.

6420 State ... William Stewart Rice

Date of Orders Mo.	Day	Year	ORDERS OF COURT	Minute Book Volume	Page
11	5	64	Defendant being present in open Court with counsel, on arraignment pleads not guilty to the charge and each charge embraced in the indictment. His case is set for trial Dec 2 1964. This the 5 day of Nov - 1964. Clark Fuller Judge		
12	3	64	Continued on Motion of Defendant Made in Open Court by Def Personally who was Present with his Counsel		
5	1965		Def being in Open Court with his Counsel, on Arraignment Pleads Not guilty and Issue Joined. Jury Finding Defendant guilty as Charged in Bill of Indictment. Jury Finding Def to Imprisonment in the Penitentiary for 5 years.		
			Def gives Notice of Appeal. Execution of Defendants Suspended Pending Appeal. Bond on Appeal is fixed at $1000.00		

JS 492

EXHIBIT "F"

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Re: WILLIAM S. RICE,

vs. Case No. 2583N.

CURTIS M. SIMPSON, Warden.

Before me, the undersigned authority, personally appeared Lewey Stephens, Jr., who after first being duly sworn says as follows: I am District Attorney for the 12th Judicial Circuit of Alabama and as such officer I prosecuted cases numbered 6427, 6428, 6429 and 6430 in the Circuit Court of Pike County, Alabama, in which cases the above-named William S. Rice, also known as William Stewart Rice, was defendant. These cases charged Rice with Burglary, 2nd degree under the law of Alabama.

Cases numbered 6427 and 6428 were tried before a jury on the 3rd day of December, 1964, and upon a verdict of Guilt the Court sentenced defendant to ten years in each case. On May 19, 1965, defendant was tried in case number 6430 before a jury which found him guilty and the Court sentenced him to five years.

I was informed by the Sheriff that the owner of the service station involved in the charge in case number 6429

had left Alabama, and as I remember, resided in North Carolina. Taking into consideration the distance involved, the other sentences and the fact that defendant had already served in prison between his original plea of guilty and his petition for writ of error coram nobis which had been granted, I moved the Court to nolle pros. Judge Eris F. Paul, the trial judge, concurred and the order was made. This motion was made by me with knowledge of the fact that the defendant had spent a vast majority of his adult life in prison, according to his FBI record.

LEWEY STEPHENS, JR.,
(Lewey Stephens, Jr.).

State of Alabama,
Coffee County.

Sworn to and subscribed before me this 25th day of July, 1967.

GLADYS CLARK,
Circuit Clerk.

Order

[Filed August 4, 1967.]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

(Title Omitted in Printing.)

Upon consideration of the return and answer and, in the alternative, motion to dismiss, filed on behalf of the respondent on August 3, 1967, it is the Order, Judgment and Decree of this Court that said motion to dismiss be and the same is hereby denied.

It is further Ordered that this cause be and the same is hereby set for a hearing on the merits commencing at 9:30 a.m., August 31, 1967.

The parties are Ordered and Directed to file briefs concerning the legal questions involved in this case, with this Court on or before August 30, 1967.

Done, this the 4th day of August, 1967.

FRANK M. JOHNSON, JR.,
United States District Judge.

Order

[Filed September 26, 1967.]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

(Title Omitted in Printing.)

The petitioner, William S. Rice, by leave of this Court, files in forma pauperis his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County in February 1962, upon pleas of guilty in four separate state Court criminal cases, he was sentenced to an aggregate of ten years in the state penitentiary.[1] Petitioner alleges, further, that in August 1964, his pleas and the judgment and sentence thereon in each of said state Court cases were set aside by the Circuit Court of Pike County, Alabama, upon his application for a writ of error coram nobis and the proof offered in support thereof. The basis for the state Court's action was that petitioner was not represented by counsel as constitutionally required by Gideon v. Wainwright, 372 U.S. 335. The petition now presented avers that in December 1964 he was retried in state cases Nos. 6427 and 6428, and upon conviction in the same circuit Court, before the same circuit judge, he was sentenced to a term of ten years in No. 6427 and ten years in No. 6428. Peti-

[1] In case No. 6427, he was sentenced to four years and in cases Nos. 6428, 6429 and 6430, he was sentenced to two years in each case; the sentences were to be served consecutively.

tioner further alleges that in May 1965 in case No. 6430, after conviction, he was sentenced to a term of five years. Case No. 6429 was nol-prossed on motion of the state solicitor in May 1965. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted in these second degree burglary cases—which, by statute in Alabama, carry a maximum sentence of ten years each[2]—now aggregate twenty-five years.

Petitioner contends that in resentencing him the State of Alabama, acting through the circuit judge of the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on the original sentence; and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County in December 1964 and in May 1965, which sentences amount to over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised his right to and for having been successful in a post-conviction coram nobis proceeding. Petitioner contends that it is constitutionally impermissible for the State of Alabama to deny him credit for the time served on the void sentence and to force upon him the risk —here a reality—of more severe punishment as a penalty for his having exercised his right to and for having been successful in Alabama post-conviction proceedings. Petitioner did not present either of these issues to the Courts of the State of Alabama on the question of exhaustion of state remedies as a state prisoner is ordinarily required to do under 28 U.S.C. § 2254. Petitioner takes the position

[2] Title 14, § 86, Code of Alabama (1940) (Recomp. 1958).

that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes.

Upon an examination of the petition as presented, this Court, by formal order entered on July 17, 1967, held that 28 U.S.C. § 2254 did not bar the filing of petitioner's application for a writ of habeas corpus in this Court. In making this determination, the Court stated:

> "Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded no post-conviction remedies by the State of Alabama where his only contentions, in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the Courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction proceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in Aaron v. State, 192 So. 2d 456 (Nov. 29, 1966), wrote:
>
> "'Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. Isbell v. State, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that

> our remedy of coram nobis automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See Wilson, Federal Habeas Corpus and the State Court Criminal Defendant, 19 Vand. L. Rev. 741.'

And, again, the same Judge, speaking for the same Court, in March 1967 in Ex Parte Merkes [198 So. 2d 789, 790], reiterated the above-quoted statement from the Aaron case and stated further, 'We see no reason to go into what should be the rule of credit for prior time until we have to.'

> "The above cases, appearing to represent the law of the State of Alabama upon the questions now presented in petitioner's application, make it apparent that Title 28, § 2254 of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented."

Accordingly, the respondent Warden of Kilby Prison was directed to show cause why the writ of habeas corpus as prayed for by the petitioner, William S. Rice, should not be issued. Upon petitioner's request, the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, was appointed to represent petitioner. The case was set for oral hearing before the Court, and now, upon the pleadings, the evidence, and the briefs and arguments of the parties, this Court proceeds to make the appropriate findings of fact and conclusions of law.

The evidence presented is uncontroverted. Petitioner's allegations as above outlined are admitted except the conclusions that he makes as to the reason for the imposition of greater sentences on being re-sentenced after his "successful" post-conviction proceeding. Petitioner was

originally sentenced in the four cases, Nos. 6427, 6428, 6429 and 6430, on February 16, 1962. He entered upon the service of the four-year sentence imposed in No. 6427 on February 16, 1962. He continued upon the service of this four-year sentence until the sentence was set aside by the Circuit Court of Pike County, Alabama, on August 28, 1964. Petitioner earned no statutory and industrial good time[3] during this period of service by reason of infractions of prison rules. However, he did not lose any of the 2 years, 6 months and 12 days he had served on No. 6427 from February 16, 1962 until August 28, 1964. When petitioner was resentenced in December 1964 to ten years in case No. 6427, he was not given any credit on that sentence, nor on the other sentences imposed in Nos. 6428 and 6430, for the time he had previously served on the sentence in No. 6427 that had been declared void by the State of Alabama. As this Court stated in Jesse Vincent Hill v. William C. Holman, Warden, 255 F. Supp. 924 (1966):

> "The constitutional requirements of due process will not permit the State of Alabama to require petitioner Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit Court. Petitioner Hill was entitled to have the illegal sentence vacated. This, of course, was done by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. He is also entitled to have the time he served on the erroneous sentence in case No. 91715 before it was vacated applied on the valid sentence that was imposed in that case by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. This

[3] See Title 45, §§ 253, 256, Code of Alabama (1940) (Recomp. 1958).

means very simply that Hill has more than served the legal sentence imposed upon him in case No. 91715. The record in this case is clear that, instead of Hill's owing the State of Alabama any additional time, the State of Alabama owes Hill for illegal incarceration for a period of between four and five years. He is due to be released immediately. Youst v. United States (5th Cir. 1945), 151 F. 2d 666; Hoffman v. United States (9th Cir. 1957), 244 F. 2d 378."

And the Fourth Circuit in Patton v. North Carolina, June 14, 1967, 35 Law Week 2737, stated:

> "It is grossly unfair for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen. . . ."

This rule of due process is applicable in this case and will not allow the State of Alabama to permit petitioner to be penalized by service in the state penitentiary because of an error the Circuit Court of Pike County made in case No. 6427. Petitioner Rice was constitutionally entitled to have the sentence imposed upon him in case No. 6427 (and also in cases Nos. 6428, 6429 and 6430) vacated. This, of course, was done by the Circuit Court of Pike County, Alabama, on August 28, 1964. He was also constitutionally entitled, upon being resentenced in case No. 6427, to be given credit for each of the days he had served upon the voided sentence that had been imposed on February 16, 1962. In addition, he was constitutionally entitled to any statutory and/or industrial good time allowance that he may have earned upon the service of the sentence in case No. 6427 from February 16, 1962 until August 28, 1964.

In this connection, see Short v. United States (D.C. Cir. 1965), 344 F. 2d 550.

The second issue presented in this case concerns whether the State of Alabama, acting through the Circuit Court of Pike County, Alabama, violated petitioner Rice's constitutional rights by subjecting him to more severe punishment upon his being resentenced in cases Nos. 6427, 6428 and 6430, after the prior sentences in these cases had been declared void and set aside in a post-conviction coram nobis proceeding initiated by Rice in the state Court. This Court, after considerable study, has concluded that a sentence imposed by a Court on retrial after post-conviction attack that is harsher than the sentence originally imposed —unless some justification appears therefor—violates the Due Process Clause of the Constitution of the United States. Marano v. United States (1st Cir., March 1967), 374 F. 2d 583.

In the Marano case, the defendant was convicted in the United States District Court for the District of Massachusetts. Upon appeal, the First Circuit Court of Appeals ordered a new trial. Kitchell v. United States, 354 F. 2d 715 (1st Cir. 1966). On the second trial, Marano was again convicted, and upon his second conviction he was given a five-year sentence as opposed to the three-year sentence in the first case. When this issue was presented to the First Circuit Court of Appeals, it was stated:

> "As we have recently held, a defendant's right of appeal must be unfettered. Worcester v. Commissioner of Internal Revenue, 1 Cir., 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must con-

template the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such certainty, Worcester v. Commissioner of Internal Revenue, supra, he likewise should not have to fear even the possibility that his exercise of this right to appeal will result in the imposition of a direct penalty for so doing. Accord, Patton v. State of North Carolina, W.D.N. Car., 1966, 256 F. Supp. 225, 80 Harv. L. Rev. 891. But cf. Hayes v. United States, 1957, 102 U.S. App. D.C. 1, 249 F. 2d 516, 517, cert. den. 356 U.S. 914, 78 S. Ct. 672, 2 L. Ed. 2d 586. But, equally, the judge should not be permitted to change his mind by deciding that he had been too lenient the first time, as was suggested here during oral argument, or, if a new judge, by having a different approach towards sentencing. We do not approve the contrary decision in Shear v. Boles, N.D.W. Va., 2/3/67, 263 F. Supp. 855, cited to us by the government. Such possibilities, if they had to be recognized, might well be substantial deterrents to a decision to appeal." [Footnotes omitted.]

In Patton v. North Carolina, in dealing with this question of a more severe sentence being imposed when a defendant is resentenced after post-conviction proceedings have resulted in voiding the original conviction, the Fourth Circuit stated:

"The risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress. For this reason the district Court declared that predicating [defendant's] constitutional right to petition for a fair trial on the

fiction that he has consented to a possibly harsher punishment, offends the Due Process Clause of the Fourteenth Amendment. * * *

"The district Court held that [defendant's] punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the state must bear the burden of showing that such facts were introduced at the second trial, since 'where the record disclosed no colorable reason for harsher punishment,' the effect would be to inhibit the constitutional right to seek a new trial. * * *

"We do not think, however, that a defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, Marano v. U.S., 35 LW 2580, which has recently held that a sentence may not be increased following a successful appeal, even where additional testimony has been introduced at the second trial. * * * Contra, Starner v. Russell, 35 LW 2706. * * *

"In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the appearance of improper motivation is a disservice to the administration of justice. * * *

"North Carolina strictly forbids an increase in a defendant's sentence after the trial Court's term has

expired and service of sentence has commenced. Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the state wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have exercised the right to a fair trial. This is an arbitrary classification offensive to the Equal Protection Clause. • • • "

The Patton case is peculiarly applicable here from a factual standpoint. In 1960 Patton, without the aid of counsel, entered a plea of nolo contendere to a charge of armed robbery and was sentenced to twenty years in prison by the North Carolina state Court. In 1965 Patton sought post-conviction review, and on the basis of Gideon v. Wainwright, 372 U.S. 335 (1963) (as petitioner Rice did in the Circuit Court of Pike County in this case), obtained a new trial at which time Patton was found guilty of the same offense. The judge sentenced him to twenty years, stating, "I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served." Patton applied to the United States District Court for the Western District of North Carolina for habeas corpus, claiming that the harsher sentence was a denial of due process and equal protection. The district Court held that petitioner must be released unless properly sentenced and, further, that to impose a sentence equal to that given under a previous void conviction is either to deny credit for time served under the previous sentence or to impose a longer sentence. The district Court further held that to deny Patton

credit for the time he had served was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as is the imposition of a harsher sentence unless the record shows some justification for it. The Fourth Circuit, in reviewing this case, did not agree with that part of the district judge's reasoning to the effect that it was constitutionally permissible to impose a harsher sentence upon retrial if some justification is shown for it. On this point, the Fourth Circuit Court of Appeals stated:

> "We are in accord with the First Circuit in Marano v. United States, 35 Law Week 280, which has recently held that a sentence may not be increased following a successful appeal even where additional testimony had been introduced at the second trial."

This Court does not believe that it is constitutionally impermissible to impose a harsher sentence upon re-trial if there is recorded in the Court record some legal justification for it.[4]

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[4] "Where a heavier sentence is imposed [following a 'successful' appeal] the burden is upon the state to build a record to support the imposition of harsher punishment." Gainey v. Turner, 266 F. Supp. 95, 103 (E.D. N.C. 1967) citing Patton v. North Carolina, 256 F. Supp. 225, 235 (W.D. N.C. 1966), aff'd —— F. 2d —— (4th Cir. 1967). See also Marano, supra at 585, where the First Circuit held that while it is impermissible to consider evidence of aggravating circumstances arising out of evidence of the crime it is nevertheless permissible to consider other facts made known to the sentencing Court which would have a legitimate bearing on the imposition of sentence. "We do not think it inappropriate for the Court to take subsequent events into consideration, both good and bad." Shear v. Boles, 268 F. Supp. 855 (N.D. W.Va. 1967), to the extent that it holds that in cases such as this the burden is on the person attacking the second harsher sentence to show that it was motivated by impermissible factors, is rejected.

Unless the reasons for the imposition of a harsher sentence affirmatively appear of record, it cannot be presumed that the

Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentences in cases Nos. 6427, 6428 and 6430 imposed on February 16, 1962 (which sentences totaled eight years to run consecutively), to a ten-year sentence in No. 6427, a ten-year sentence in No. 6428, and a five-year sentence in No. 6430, which sentences are also to run consecutively. It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold.

The basic concept of due process makes it unfair for the State of Alabama to imprison Rice in February 1962, to offer him the right to post-conviction review[5] to test and set aside constitutionally defective sentences, and then to subject him to greater punishment—three times greater than originally imposed—if he successfully exercises that right. Under the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional.

An equally strong basis upon which the harsher sentences imposed by the Circuit Court of Pike County in these cases are unconstitutional is that they violate the Equal Protection Clause of the Fourteenth Amendment

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motives which prompted the imposition of such a sentence are constitutionally permissible. Cf. Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

[5] In Alabama, this review is by writ of error coram nobis. See Wiman v. Argo, 308 F. 2d 674, 677-78 (5th Cir. 1962). This method of post-conviction review in lieu of habeas corpus is constitutionally permissible. Taylor v. Alabama, 335 U.S. 252, 261, 68 S. Ct. 1415, 92 L. Ed. 1935 (1948).

to the Constitution of the United States. Patton v. North Carolina, supra. In Alabama, there can be no increase in a sentence in a criminal case after the sentence is imposed. This is a protection that is given to all convicted criminals in this state. To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and who do so successfully is unfair discrimination and does nothing except serve to limit the use of post-conviction proceedings in the Alabama state Courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of appealing his conviction, or exercising his post-conviction remedies. Such a denial is constitutionally impermissible when the risk of a harsher sentence—as it is if the position of the State of Alabama is to be sustained—is borne exclusively by those who pursue their appellate rights of post-conviction remedy. Cf. Smartt v. Avery, 370 F. 2d 788 (6th Cir. 1967). It is basic to the theory of equal protection that the imposition of harsher treatment on prisoners solely because they successfully pursue available post-conviction remedies cannot possibly bear any rational connection with any legitimate state interest. In order to protect this constitutional right, the original sentence, which the state may no longer challenge of its own accord, must operate as a ceiling for any sentence subsequently imposed following the successful post-conviction proceeding and retrial of the accused for the same offense. This means that, in the absence of some showing of necessity or justification, the maximum sentence that could be constitutionally imposed upon petitioner Rice in state Court case No. 6427 after his reconviction in December 1964, was four years and in case No. 6428, two years and in case No. 6430, two years. This Court, in the absence of some competent evidence, cannot accept the contention that the state makes in this case that case

No. 6429 was nol-prossed in order to compensate petitioner for the time served on the illegal sentence imposed on February 16, 1962 in case No. 6427. On the contrary, when the illegal sentences were set aside in August 1964—including the one entered in case No. 6429—and the state was put to its proof, the nol-pros was entered for some reason other than a sympathetic one toward Rice. In all probability, the answer lies in the circuit solicitor's affidavit that the state attached to its return and answer in this case, which indicates that the solicitor was "informed by the Sheriff that the owner of the service station involved in the charge in case number 6429 had left Alabama, and as I remember, resided in North Carolina." The imposition of sentences totalling three times greater than those originally imposed permits no other reasonable explanation as to the abandonment of the prosecution in case No. 6429.

In summary, the State of Alabama must give petitioner Rice credit for the time he served upon the illegal sentence imposed in February 1962 in state Court case No. 6427. Additionally, the State of Alabama must give petitioner Rice credit for the time he has served to date on case No. 6427 imposed in December 1964. In this connection, Rice, as noted above, served 2 years, 6 months and 12 days on the sentence imposed in No. 6427 before that sentence was voided by the state circuit Court. Since being resentenced in December 1964 in No. 6427, Rice has served an additional 1 year, 10 months and 26 days; and since being resentenced in No. 6427, he has earned 9 months and 26 days "good time." Thus, Rice has, as of August 31, 1967, actually served 4 years, 5 months and 8 days on the four-year sentence as originally imposed in No. 6427. If given credit for his "good time"—and this credit must be given—Rice has, as of August 31, 1967, served the equiva-

lent of 5 years, 3 months and 4 days on this four-year sentence. Rice is entitled to be released immediately from any further incarceration by reason of the sentence imposed by the Circuit Court of Pike County in state Court case No. 6427. Furthermore, Rice is entitled to have credited to the two-year sentences—the maximum constitutionally valid in Nos. 6428 and 6430—the time served on No. 6427 that exceeds four years.

In accordance with the foregoing, it is the Order, Judgment and Decree of this Court that the petitioner, William S. Rice, is presently illegally incarcerated by the respondent, Curtis M. Simpson, Warden of Kilby Prison, by reason of the sentence imposed by the Circuit Court of Pike County, Alabama, in state Court case No. 6427 in December 1964.

It is Ordered that William S. Rice be discharged immediately from the custody of the State of Alabama and the custody of Curtis M. Simpson as Warden of Kilby Prison, Montgomery, Alabama, which custody is or may be pursuant to the conviction and judgment of the Circuit Court of Pike County, Alabama, in state Court case No. 6427 rendered and imposed in December 1964.

It is further Ordered that the costs incurred in this proceeding be and they are hereby taxed against the respondent, for which execution may issue.

Done, this the 26th day of September, 1967.

FRANK M. JOHNSON, JR.,
United States District Judge.

* To the extent that Newman v. Rodriguez, 375 F. 2d 712 (10th Cir. 1967), is to the contrary, this Court declines to follow it for the reasons stated in Hill v. Holman, 255 F. Supp. 924 (M.D. Ala. 1966).

Transcript of Proceedings

[Filed October 6, 1967]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 2583-N.

WILLIAM S. RICE,

vs.

CURTIS M. SIMPSON, Warden, Kilby Prison, Montgomery, Alabama.

Before:

HON. FRANK M. JOHNSON, JR., *Judge*,
at Montgomery, Alabama, August 31, 1967.

Appearances:

For Petitioner: Oakley W. Melton, Jr., and Thomas S. Lawson, Jr.

For Respondent: Paul T. Gish, Jr.

(The above case coming on for hearing at Montgomery, Alabama, August 31, 1967, before Hon. Frank M. Johnson, Jr., Judge, the following proceedings were had):

The Court: Rice against Simpson, petitioner ready?

Mr. Melton: Yes, sir; we are ready, your honor.

The Court: How about the Respondent?

Mr. Gish: Yes, your honor.

The Court: Do you have witnesses?

Mr. Melton: Yes, sir.

The Court: Will you ask them to come around so they can be sworn.

Mr. Melton: Mr. Dean.

[2] Marshal: All witnesses, please come around.

The Clerk: All witnesses, please raise your right hands. You and each of you do solemnly swear that the testimony you give in this cause to be the truth, the whole truth, and nothing but the truth, so help you, God.

The Court: Do you want the rule invoked?

Mr. Melton: No, sir; we are going to take Mr. Dean first.

Mr. Gish: No, sir.

The Court: You want the rule?

Mr. Gish: No, sir.

The Court: All right; just have a seat.

Mr. Lawson: Want us to take the first witness, Your Honor?

The Court: Yes, you have the burden.

Mr. Melton: All right, sir. Mr. Dean.

Mr. Lawson: He is on the—on the stand.

Mr. Melton: Excuse me; go ahead, Tom.

M. S. DEAN, witness for Petitioner, having been duly sworn, testified as follows:

Direct Examination by Mr. Lawson:

Q. Please state your name, sir? A. M. S. Dean.

[3] Q. Mr. Dean, what is your occupation? A. Record Clerk for the State Board of Corrections.

Q. As Record Clerk of the State Board of Corrections, is it your job to keep records on each individual prisoner in the Kilby Prison? A. Yes, it is.

Q. Is it also your job to keep up with the statutory good time and the industrial good time earned by each of the prisoners? A. Yes, it is.

Q. Will you please explain to the Court how the statutory good time and industrial good time works? A. Your statutory—is two different types of good time. Statutory starts out with six days anytime up to a year, and seven days a month from anything over a year up to three years, and eight days—no, I am wrong in that. It is six days a month from a year and a day—I mean from a year up to three years, seven days a month from three year—three years up to five years, eight days a month from five years up to ten years, and anything over ten years is ten days a month, a third of his time.

Q. Now, Mr. Dean— A. Wait a minute; industrial good time.

Q. All right; yes, sir? A. Your industrial good time is three days for the first year, four days for the following four years, and five days—

The Court: Three days per month when the sentence is [4] just up to one year; is that what you mean?

Witness: No, sir; industrial good time is not—

The Court: Doesn't depend—

Witness: —according to length of time.

The Court: Doesn't depend on length; all right. He gets three days a month for the first year he is in, regardless of the length of his sentence?

Witness: Right.

The Court: Go ahead.

Witness: Now, Judge, we have a rule, it is a—that he has to serve a ninety-day period before he can start earning the three days.

The Court: All right.

Witness: From then on, he earns four days a month, and from the fifth year on, he earns five days a month. That is from memory; I believe I am correct on that, Judge.

Q. Now, Mr. Dean, the information that you have just given us is set out in the Alabama Code, is it not, in Title 45, Sections 253 through 256? A. It is set out in the Code; I don't remember what section; it is in Title 45, I don't remember what section.

Mr. Lawson: We refer the Court to those particular provisions.

Q. Mr. Dean, you mentioned that the industrial good time does not begin until after he has been in the penitentiary for ninety days? [5] A. That is correct.

Q. And this is computed on the basis of certain work that he does in the prison system, is it not? A. Well, originally, the law was set up for that; but we received, or the Attorney General gave us a ruling that the—when the man is

working, as long as he is working or—or performing his duties in prison, we could give it to everybody. It was originally set up for industries, but the—we are—I—I got a ruling from the Attorney General that as long as a man was performing his duties or working, we could give it to everyone.

Q. Well, then, as a matter of course, is this industrial good time given to the prisoners in an administrative manner—I mean the time that they serve is computed, and this particular amount of time is deducted from their sentence so long as they are working? A. Yes; yes; as long as he does not violate any prison rule.

Q. All right; with respect to violation of prison rules, are you speaking, now, of good conduct time or industrial production time? A. Both; both times.

Q. Well, with respect to this limitation, so long as he is performing well and is not in trouble, suppose a person was sentenced for thirty years in prison, and the first day he was there, he got in trouble, but thereafter he was—his conduct was perfect; would he be—would he therefore lose all of these benefits to which he was entitled? A. No, sir; it's—it's—the type of rule he violates depends on [6] how much time is taken.

Q. Right; now, they would take this time when he is punished or when he gets in trouble from the time he has earned—I mean the deductions he has already earned, wouldn't they? A. Well, either that or make it so he couldn't earn that much time; if he doesn't have that much time to take, we fix it so he couldn't earn that much time.

Q. Well, with these particular rulings made by you people at Kilby, when a person gets in trouble or in computing the amount of good time, both industrial and statutory, to

which he may be entitled, would that be reflected in your records? A. Yes, it would.

Q. Is it computed on a month to month basis? A. No, sir; it is just computed when he violates the prison rule and his good time is taken, or on that basis.

Q. So you would have a record of any violation of the rules, any deductions from his good time? A. That's right.

Q. And if you had one or two, and no others were listed on your records, then he would be entitled to all of the statutory and industrial good time which he had earned less the particular amount set out in your records? A. That's right.

Q. As punishment? A. That is correct.

[7] Q. Mr. Dean, I will show you a mimeographed sheet, which we will list as Petitioner's Exhibit 1, and ask you to identify it, please, sir? A. This is a form that shows these —amount of sentence, and this is statutory good time deductible, or lists what—shows what it to be and industrial good time to be.

Q. Is this printed at Kilby Prison? A. I couldn't tell you that.

Q. You have never seen one like this before? A. I have never seen that one before.

Q. Do you have one similar to this that you work with in your—. A. It is similar to that, but I can't say that was printed at Kilby or—or where it was printed.

Q. Well, do you have forms such as these? A. We have a form that we use in the office.

Q. But it does not appear to be this particular form? A. No, sir; it does not.

Q. Do you have one of the forms which you use in your office with you? A. I do not.

Q. However, such a form—does it just reflect the—an easy method of determining the computations under the statute; is that the purpose? A. Yes, this—when the law was first passed, we went through and worked up the time that a man would—could earn on any given sentence, on both statutory and industrial good time.

Q. Nevertheless, without one of these sheets or one similar to this, [8] you could compute the amount— A. Yes.

Q. —of industrial or good time? A. That is correct.

Q. Now, Mr. Dean, do you have with you the records referring to the petitioner which have been kept at Kilby Prison? A. I do.

Q. Would you refer to those records, please, sir and tell us whether Mr. Rice's conduct during the time that he has been in Kilby Prison, since his first conviction in 1962, has been such as to entitle him to receive any credit for or deductions for industrial time and statutory good time? A. Well, now, what sentence are you talking about?

Q. Well, what I am referring to, now, is anything in your records which would reflect a deduction—a limitation on the deductions for which he would be entitled. As I understand your testimony, these prisoners are entitled to these deductions as a matter of course unless a notation is made in your records penalizing them for certain conduct.

The Court: His question had to do with which sentence are you interested in; are you interested in the ones that were set aside in August '64, or the ones imposed later?

Mr. Lawson: Well, we will start with the earlier ones, Your Honor—

Q. —and then we will ask you about the later ones? [9] A. The records indicate on the sentences that were set aside he had two disciplinary actions with two penalties.

Q. All right; does the—do your records indicate the number of days that he was penalized? A. Penalized a total of fifteen months.

Q. That means for fifteen months he could earn no good time? A. No; it means that that much good time was taken away from him, that he couldn't earn that much good time.

Q. Oh; do you have the dates referring to these particular violations?

The Court: Well, it must be some misunderstanding; he just stayed in from '62 to '64 in those sentences; I don't see how he could have lost fifteen months in two years.

Witness: Well, Judge, the law states that—that the Department has the authority to give—

The Court: Well, he couldn't accumulate—

Witness: —let him earn—with good conduct.

The Court: He couldn't accumulate fifteen months industrial and statutory good time in two years, could he?

Witness: No, sir; but the law states that the Department can—that he can't earn—that the Department set up a period that he couldn't earn that much time.

The Court: Well—then that means for fifteen months he did not earn any good time; is that what that means?

Witness: No, sir; it means we penalized him the [10] fifteen months, Judge; he might not—might

take him longer than the fifteen months to earn the fifteen months, see.

Q. Well, wouldn't it as a matter of course take him considerably longer than fifteen months to earn fifteen months good time? A. You cannot earn fifteen months good time on fifteen months; that will be a day for day basis.

Q. Is it my understanding that you penalize a man not only for the industrial good time, but also for the good conduct good time before he's even earned the—this time? A. That is correct, set it up to where—

Q. And that a person— A. —he cannot earn it.

Q. And that if a person has served one year in prison and gets in trouble, still has nine years to go on a sentence, then you could penalize him for that one violation for all of the remaining time that he has in prison? A. Well, I—I guess you could, but we don't; depends on the type of violation.

The Court: Do you have that computation made, Mr. Dean, on those three sentences that were set aside, 6427, 28, 29—maybe there were four of them —and 30?

Witness: Yes, sir; four cases, total of ten years.

The Court: To be served concurrently?

Witness: No, sir; consecutively.

The Court: How much was he sentenced, according to [11] your records, in 6427?

Witness: 6427 was four years.

The Court: All right; and 6428?

Witness: Let me go back to my transcript to be sure on that, Judge, so it won't—let's see, 6428 is two years.

The Court: And 29?
Witness: It is two years.
The Court: And 30?
Witness: It is two years.
The Court: A total of ten?
Witness: Yes, sir.
The Court: To be served consecutively?
Witness: Yes, sir.
The Court: All right. Go ahead, Mr. Lawson.

Q. Mr. Dean, referring to the statute which sets out these deductions, would it be correct to say that a person sentenced to ten years in jail would be entitled to approximately three years and four months statutory good time and nine months and sixteen days industrial good time? A. Yes.

Q. Then what you have done on the basis of these two instances in which he got in trouble is take from this deduction one year and three months? A. That is correct.

Q. And that was a penalty imposed prior to the time he had anything [12] you could really penalize him for? A. Well, that is correct.

Q. I mean he had not earned all of this time? A. He had not earned it all.

The Court: May I ask a question?
Mr. Lawson: Yes, sir.
The Court: Was that penalty imposed during the first sentence he was serving?
Witness: Yes, sir; it was. We do not—
The Court: Did the penalty relate to other sentences—
Witness: No, sir.

The Court: —that had been imposed that he was not yet serving?

Witness: No, sir.

The Court: Then the fifteen months that he was deprived was on the four-year sentence?

Witness: Yes, sir; we do not take any good time except on that one case he is serving on; we do not go into any cases beyond that one case.

Q. Then I will ask you this, Mr.—

The Court: What was the maximum he could have earned on a four-year sentence?

Witness: Judge, I believe it would be one year, seven months, and twenty-three days.

The Court: Then all that he could have possibly [13] earned was revoked administratively except about four months?

Witness: Yes, sir; that is correct.

The Court: All right; go ahead. Incidentally, what was that for, escape?

Witness: Escape and—let's see what the other one —escape and gambling in the cell.

Q. Do you have the dates of those offenses? A. Well, the gambling in the cell was dated on January 15, '63, and the escape was on March 8, '62.

Q. And please tell me on the first one, on the gambling charge, how much was he penalized? A. Two months.

Q. And on the escape, I assume he was penalized thirteen months? A. Thirteen months.

Q. Do your records show when he was admitted to Kilby Prison? A. He was sentenced on the original four cases was set aside on February 16, '62.

Q. So this occurred—his first offense occurred less than a month after he had been in Kilby Prison? A. Well, it occurred—escape occurred on March 8, '62.

Q. He was—and he was convicted on February 16, '62? A. That is correct.

Q. And at that time, he had earned no good time and no industrial days; is that correct? A. At that time, he had not.

[14] Q. And yet he was penalized thirteen months? A. That is correct.

Q. Now, Mr. Dean, let's go to the time which he has put on—has put in in connection with his second sentences, and please check your records and tell me if he has any offenses or violations during that time for which he has been penalized? A. There is no penalties on those—on these last cases sentenced in October, '65.

Q. And, Mr. Dean, assuming that a person had been committed to the penitentiary for eight years, am I correct in stating that he would have earned or be entitled to a total of two years, one month, and eighteen days statutory good time and eight months, sixteen days industrial good time? A. If that form is correct, it would be. I am not—I am not saying the form is not correct or it is correct.

Q. Well, would you compute that for me, please, sir? If you would like to have the statute, I have it here (presented). A. If I haven't made an error, looks like he would serve five years, ten months, and fourteen days, if I haven't made an error on it.

Q. Well, I asked you to figure out the amount of good time to which he would be entitled; that would be the difference between eight years and the figure you just gave me? A. No; this includes all—all the good time, industrial and statutory.

Q. You say five years, two months, and eight days? [15] A. Five years and ten months and fourteen days, if I haven't made a mistake on it.

The Court: That is on the new sentences?

Witness: No, sir this is on the original eight years.

Mr. Lawson: Judge, this was a question I gave him, assuming a person had been committed to the penitentiary for eight years, now much of that—how much credit could he get for good time and industrial time?

A. Well, now, he would—he would have to serve five years, ten months, and fourteen days, and, of course, take that from eight years would give you the amount of good time that he could earn.

Q. And from the amount of this good time would be deducted any penalties which he had received during the course of— A. That is correct.

Q. —the five years that he had been in jail? A. I might mention that we—that we aggregate a man's sentences to give him credit, so he would receive as much good time as a man with just a straight eight-year sentence.

Q. Yes, I understand, that is in accordance with the statute that— A. Yes.

The Court: May I ask a question at this point. What sentence was he serving when he lost his fifteen months, the sentences imposed February, '62, what sentence was he serving?

Witness: He was serving on case number 6427, the four-year sentence for burglary.

[16] The Court: All right. He never did get—enter upon service of 6429?

Mr. Lawson: No, sir; no, sir.

Witness: I don't believe it was, just the—let me check and see.

The Court: The reason I am asking, Mr. Gish, in his response, says that this is the reason that it was nol-prossed, that he served part of 6429.

Mr. Gish: If Your Honor—

The Court: I just wondered how he got the 6429 without serving 27 and 28.

Mr. Gish: If Your Honor please, I did—I didn't mean that he served that case; I meant in my response that because of the service of time, that one of the cases, which happened to be 29, was nol-prossed. It was not because he had served that particular case. He had served in 27; it was 29 that was nol-prossed.

The Court: I take it, then, the Circuit Court here in Pike was attempting to—to give him credit for the time he had served on any sentences to be imposed; is that what they were trying?

Mr. Gish: It was according to the statement of the District Attorney, which is an Exhibit to the return that is what he told me, Your Honor.

The Court: Can I assume from that that there wasn't any reason for him to be punished by the Court in imposing greater sentences when he came back before it if they were giving him credit [17] for the time he served?

Mr. Gish: I don't think this case, Your Honor, can be decided on that basis. I think just as a practical matter—I am trying to show that in this case, that as a practical matter, he did receive some consideration because of the time he has spent that he

would not get credit for; I don't think that it was necessary that the case be nol-prossed.

The Court: Do you have some evidence to show why he was given sentences totaling three times greater the second time than he was the first time?

Mr. Gish: No, sir. I think, sir, that it should be considered in the—the first sentences were on pleas of guilty, and the last sentences were after trial on pleas of not guilty.

The Court: Is that—does that mean that if you do not plead guilty and go to trial and get convicted, you get more severe sentences than if you plead guilty?

Mr. Gish: I can't say that that would be true. I don't know, sir. I think that it is common knowledge that a man may in many instances plead guilty and—and get a lighter sentence than he would otherwise.

The Court: Well, is that what happened here?

Mr. Gish: I don't know, sir.

The Court: Do you have any evidence on that point?

Mr. Gish: No, sir; I do not, sir.

Mr. Lawson: Your Honor, we point out that when he [18] pled guilty the first time, he did not have counsel, and the writ of error coram nobis was granted for that reason.

The Court: I have that before me.

Q. Mr. Dean—

The Court: Should I attach any significance to your statement that the only basis, as far as you know, for him getting sentences totaling three times greater the second time was that he went to trial the second time?

Mr. Gish: Your Honor, I am afraid I am getting into an argument here that—

The Court: I don't intend to argue; I am trying to get information. I am startled; I am startled and shocked—

Mr. Gish: Your Honor—

The Court: —by the fact that a man gets ten years in four cases on the first time, he files a coram nobis and gets them set aside, and he goes back, and one of them is nol-prossed, and then the three remaining cases, he gets twenty-five years in the same Court.

Mr. Gish: That is right, Your Honor. I know—

The Court: Does that shock you?

Mr. Gish: No, sir; I think—I think, Your Honor, that on a plea of guilty, a man comes in and says, "Judge, I am guilty, I admit"—in effect, he says, "I—I admit that I did wrong; I am asking for leniency; there is no use to try me; I am guilty." I think that many times, Your Honor, a trial Judge is justified in giving the man a lower sentence than he would if he came [19] in and after being presumed innocent had to be proven guilty, all the time maintaining that he was innocent. I think in this particular—particular case, we must assume after pleas of guilty on one hand, and pleas of not guilty on the other hand, and convictions in both instances, we must assume that this man was undoubtedly guilty. Now, when he comes in—

The Court: (Nodded to indicate affirmative reply.)

Mr. Gish: —in one instance and admits his guilt, I think that is a long way toward rehabilitation, toward maybe this man is going to straighten out;

maybe with a light sentence he will learn his lesson, so to speak, and he will come out and make a good citizen. Now, I am not saying, Your Honor, that that would happen in a hundred per cent of the cases. I—I don't know, and no man knows whether it would in a particular case. But I do say, Your Honor, that a trial Judge would be justified in taking a guilty plea into consideration as opposed to a not guilty plea.

The Court: (Nodded to indicate affirmative reply.)

Mr. Gish: To me, it makes sense, Your Honor.

The Court: (Nodded to indicate affirmative reply.)

Mr. Lawson: Your Honor, with respect to the rehabilitation which he has just mentioned, I would point out that, of course, the purpose of—one of the purposes of the prison system is to rehabilitate prisoners. In—in this instance, they sentenced him to twenty-five years without giving him any credit for the time that he had spent in the penitentiary before; and assuming that the [20] purposes of our prison system are in any way being accomplished, it would certainly seem that he would be entitled to less, rather than more.

The Court: Well, I started this by inquiry of Mr. Gish concerning why one of them was nol-prossed, and it is a little premature; it is before you get through with your evidence; so I will hear you on your moral aspects of your case later.

Q. Mr. Dean, my figures disagree somewhat with yours that I have on this sheet which I showed you; I wonder if you could provide the Court with a—one of your forms that you use in the office? I know that I have asked you to make hasty computations. A. Yes, I will be glad to.

Q. So that we may be sure that in computing this particular time that it is accurate.

Mr. Lawson: That's all, sir.

Cross Examination by Mr. Gish:

Q. Mr. Dean—

Mr. Gish: Excuse me.
The Court: (Nodded to indicate affirmative reply.)

Q. Mr. Dean, after this man was retried and resentenced and sent back to Kilby, was there or was there not any computation required or done when he first came back? What I am trying to get at is was there anything carried over into these new sentences in the way of good time or deductions from good time? [21] A. No, sir; when one case is set aside or he completes one case, that is it; we do not take any good time from a succeeding state—case or any additional cases on him.

Q. When he came back and was resentenced on May 18, 1965, in case number 6430, he came in as a new deal, so to speak, just like a new sentence? A. Yes, we received him as a new individual.

Q. All right. Now, I believe you mentioned in some testimony earlier that you compute good time so that a man who has one ten-year sentence and a man who has five two-year sentences would be entitled to the same deductions? A. That is correct: any individual gets the same amount of time as any other individual with the same amount of time, whether you got five cases, three cases making a total, or what not.

The Court: Whether they are concurrent or consecutive?

Witness: Well, concurrent is the same; I mean, of course, he serves that with another sentence, but they do get the same amount of time.

Q. A man serving a concurrent—serving two sentences concurrently, say of ten years each, would he be entitled to any more good time than a man who had just one ten-year sentence? A. No; anytime a man receives ten years, anything over ten years everything is the same amount of good time.

The Court: Ten days a month?
Witness: Yes, sir.

[22] Q. Now, I believe you stated that a penalty in one case is not carried over into any subsequent sentences; is that correct? A. It is not unless he is serving a concurrent case; it would have to be carried over to that concurrent case.

The Court: Of course, mathematically, that is impossible, because he doesn't get through serving his first sentence—
Witness: That—
The Court: —until he pays what he owes?
Witness: That is correct.
The Court: You have nothing to carry over?
Witness: No, sir.
Mr. Gish: I believe that is all, Mr. Dean.

Redirect Examination by Mr. Lawson:

Q. Mr. Dean, do you recognize this as a—Exhibit 1, Petitioner's Exhibit 1, as being one of the forms used in the

Classification Office at Kilby Prison? A. No, sir; I do not, because I don't know what Classification Officer used.

Q. Do you have any reason to doubt that this is not correct; could you look at it and tell us whether it is correct? A. I—I cannot off hand go down and figure all the good time on—on that many years and tell you whether it is right or not; I don't particularly have any reason to doubt it.

[23] The Court: You are going to make that computation for me?

Witness: Yes, sir; I will send you a copy, Judge.

Mr. Gish: Have you introduced that Exhibit?

Mr. Lawson: No; we have not.

Mr. Gish: All right.

By Mr. Lawson:

Q. Mr. Dean, do your records reflect whether the petitioner was given any credit for the prior service, for his prior service in Kilby Prison when he was resentenced? A. No, sir. I do not.

Q. Do your records reflect whether he was given any credit for good conduct or industrial time earned while he was serving in the penitentiary for the first time when he returned after his resentencing? A. You mean given credit on the new sentence?

Q. Yes? A. No, sir.

Mr. Lawson: That's all.

The Court: As a matter of fact; your records show he didn't earn any on the first sentences; is that right?

Witness: Not—Judge, when a man—when he sets the sentence aside and he comes back under these

new cases, that is what we have to figure that man up on.

The Court: If it hadn't been set aside, he still wouldn't have earned any, because he forfeited fifteen months in two [24] years?

Witness: When he has earned three or four months, the balance of it on that first four years—

The Court: He just served two years.

Witness: Well, that is true; he couldn't earn any just by serving, but if he had completed, he would have served.

By Mr. Lawson:

Q. Assuming he had been entitled to any, would he, under your present system, have been credited with good time earned during his first sentence when he was resentenced? A. Not on our records; we couldn't do that.

Mr. Lawson: That's all.

Recross Examination by Mr. Gish:

Q. Mr. Dean, when a man has two sentences, sentence A and sentence B, and he is serving sentence A, if he goes back on coram nobis, and that sentence is set aside, is his time credited to sentence B? A. Yes, if he has any outstanding sentences that is to be served at the expiration of the cases that are set aside, he is given credit on those additional sentences.

Q. Mr. Dean—

The Court: That were not set aside?

Witness: Yes, sir.

The Court: All right.

Q. Now, Mr. Dean, in the case of Mr. Rice, on August 28, 1964, the date on which coram nobis was granted, were there any cases or any sentences that he—that your records show that he had on [25] that date? A. No, the records indicate that the sentences were set aside was all the sentences he had to serve with this Department.

Mr. Gish: That's all.

Redirect Examination by Mr. Lawson:

Q. Mr. Dean, is it my understanding that if the petitioner had had another sentence which was not set aside, which he had not been serving at the time he was erroneously convicted and was serving these particular sentences, that upon the first sentences being set aside, you would have credited the time that he had served upon the valid sentence which remained? A. That is correct.

Q. But if a person is convicted of four different crimes, and all of those cases are set aside because of errors committed by the State and he is retried, then the time which he has served and on those sentences, he receives absolutely no credit for? A. I don't—if that is all he has, and they are set aside, and he is carried back and resentenced, they are not—he does not receive any credit; there is no way we can give it to him.

Q. So the decision is made—it is something vague—that this time that he has served must have a valid sentence to connect to, to attach to? A. Well, I don't know as it's got to have that to connect to; all I am stating is that if a man has a sentence to serve, and the case [26] he is serving on is set aside, well, that time is credited to that sentence he has to serve; I don't know whether there is any attachment to each other or not.

Q. In other words, as in this case, a person really could spend more time in the penitentiary serving a sentence than is provided by the statute under which he was convicted? A. Well, I don't know that; I couldn't tell you that.

Q. In this instance, on the first case—in the first case he was tried on, he was sentenced to and was serving—he was sentenced to four years in prison, was he not; don't your records reflect that? A. That is correct.

Q. And he served two and a half years; is that correct; approximately? A. He served approximately that much.

Q. And he was resentenced on that case to ten years in prison? A. That is correct.

Q. On the same charge? A. That is correct.

Q. In other words, the State expects him to serve twelve and a half years for a crime where the statute only provides a maximum ten year sentence? A. Well, now, you are getting—we don't expect to see him serve—we don't make him serve anything except what the Court tells us to make him serve.

Mr. Gish: We object, Your Honor.

[27] The Court: I think I understand it; that is a matter of argument.

Mr. Gish: That's right.

The Court: What was the maximum sentence in 6427 on your statutes?

Mr. Melton: Ten years.

Mr. Gish: Ten years.

Mr. Lawson: They were all second degree burglary.

Mr. Gish: They were all ten years.

Q. Mr. Dean, one last question; was Mr. Rice given any credit of any time—any kind for the two and a half years he served in prison before his resentencing? A. Not by this Department on his new sentences.

Mr. Lawson: That's all.
Mr. Gish: That's all.

WILLIAM S. RICE, Petitioner, having been duly sworn, testified as follows:

Direct Examination by Mr. Melton:

Q. This is William S. Rice? A. Yes, sir.

Q. Mr. Rice, you are the petitioner in this case? A. Yes, sir.

Q. And you are now incarcerated in Kilby Prison? [28] A. Yes, sir.

Q. And have been there since when; how long have you been in Kilby Prison? A. Well, since February 16, '62.

Q. You originally convicted in the Circuit Court of Pike County? A. Yes, sir.

Q. And sentenced to Kilby Prison on February 16, 1962? A. Yes, sir.

Q. Now, have you been in Kilby Prison consistently since that time except for the time you were taken back to Pike County for your retrials? A. I have been in Kilby Prison all of that time with the exception of some time that I served in jail waiting on trial and after trial.

Q. That was down in Pike County? A. Yes, sir.

Q. In the County Jail of Pike County? A. I haven't been out of the penitentiary—I haven't been free since then.

Q. All right, sir. And you have either been in the Kilby Prison Penitentiary or the County Jail down in Pike County awaiting these retrials? A. Yes, sir.

Q. All right, sir; now, is it true, Mr. Rice, that you were originally convicted in these four cases in Pike County and given a total of ten years? [29] A. Yes, sir.

Q. Did you have a lawyer in those proceedings? A. No, sir.

Q. And while you were in Kilby Prison, and subsequent to the Gideon versus Wainwright and Escobedo decisions, did you file a writ of error coram nobis in the Circuit Court of Pike County to set aside those four original convictions? A. Yes, sir. I did.

Q. Was that writ granted by the Circuit Court of Pike County? A. Yes, sir.

The Court: Who was the Judge that sentenced you originally?

Witness: Mr. Eris F. Paul.

The Court: Judge Paul. Who was the Judge that set them aside?

Witness: Eris F. Paul.

The Court: And who was the Judge that resentenced you?

Witness: Honorable Eris F. Paul.

The Court: Same Judge?

Witness: Yes, sir.

Q. All right, sir; after Judge Paul set aside these convictions, Mr. Rice, had you—you—you said you had been in Kilby Prison all that time, hadn't you? A. Yes, sir.

Q. Had there been any additional evidence or new aggravating [30] circumstances or anything that was developed

between the time you were originally sentenced and the time you were retried and resentenced in these cases? A. In what direction?

Q. Well, had you done anything other than be in prison as a prisoner during that two-and-a-half-year period? A. No, sir.

The Court: Well, he had escaped.

A. Well, yeah; a couple of disciplinaries.

Q. Disciplinary actions for escaping— A. (Nodded to indicate affirmative reply.)

Q. —and then the gambling in the barracks there that he testified about? A. Well, they call it gambling; it was having some cards, which cards were contraband, but they —it hadn't been too contraband; in other words, just if they took a notion.

Q. All right; other than those two instances, though, Mr. Rice, had you done anything other than serve your time in the penitentiary between the time of your first convictions and your retrials and reconvictions? A. No, sir.

Q. All right, sir, I will ask you, now, if on the second trial, you had any conversations with any of the State officials on behalf of the State of Alabama as to the reasons why you received this increased—threefold increase in the punishment you had [31] originally received? A. No, sir.

Q. Did you have any conversation with the Sheriff about that? A. Well, the Sheriff of Pike County, I did.

Q. All right, sir; tell the Court what the Sheriff said? A. Well, he said that—that more than likely that—he explained it that Mr. Paul was probably mad because I came down there to get a new trial.

Mr. Gish: We move to exclude that.

The Court: I sustain it.

Q. Were you, Mr. Rice, the first petitioner to ever file a writ of error coram nobis in the Circuit Court of Pike County after these decisions by the Supreme Court of the United States? A. Are you talking about the Gideon—the Gideon case and Wain—

Q. Gideon and Wainwright, and Escobedo? A. Yes, sir I was the first one, I believe, because I—I didn't—

The Court: He was before Escobedo, wasn't he?

Mr. Melton: No, sir. As we understand it, Your Honor, Gideon was decided in March of '63 Escobedo was decided in June of '64; and Mr. Rice's writ was granted in August of '64.

Witness: Well, when the last case was decided, that is when I wrote the writ.

Q. That is when you wrote your writ? A. Error coram nobis.

Q. After the Escobedo decision came out? [32] A. Yes, sir.

Q. And then you do understand you were the first one to file such a writ in the Circuit Court of Pike County? A. As far as I know, I am.

Q. All right, sir. Now, do you know of any additional evidence that the State had access to on the second trial that was not available to the State on the first trial when you pled guilty? A. No, sir, and I don't know of any evidence at all, even before or after.

Q. As far as you know, it was the same evidence that you were convicted on? A. I was convicted on the same thing, you know.

Q. All right. Now, I will ask you, Mr. Rice, if you received a transcript of the evidence in the two cases that you were retried on and given ten years? A. Yes, sir.

Q. All right, sir; and did you appeal those to the Alabama Court of Appeals? A. Yes, sir.

Q. And were they affirmed by the Alabama Court of Appeals? A. They was affirmed.

Q. Is this the transcript of the evidence in the two cases where you were retried and given ten years, where you had originally gotten—well, a total of twenty years when you had originally gotten six years? [33] A. Yes, sir.

Mr. Melton: All right, sir. We would like to offer this transcript of the evidence in those two cases, Your Honor.

The Clerk: Petitioner's Exhibit number 2.

The Court: It will be admitted.

Q. When you were retried, Mr. Rice, on cases number 6427 and 6428, were those two cases in which you received the total punishment of twenty years—

The Court: Those are the two cases to which this transcript refers now?

Mr. Melton: Yes, sir.

Q. Were those two cases where you were sentenced to twenty years when you originally had six years, were they both tried in the afternoon of one day and the morning of the next day? A. Yes, sir.

Q. How long did the two trials take, the total time that the two trials took, in your best judgment and opinion? A. My best judgment, I don't think it took over thirty minutes for both trials, putting together, drawing the jury, putting them in the box, and them going to the anteroom

and coming back with a verdict of guilty. Now, it could be a minute or two less or a minute or two more.

Q. All right; but one was tried one afternoon and carried over until the next morning? A. The first case was held up awhile on that afternoon, because they [34] subpoenaed a witness out of Montgomery.

The Court: What difference does that make?

Mr. Melton: Well, we think, Your Honor, that it shows the entire atmosphere in which he was tried.

The Court: Did he have a lawyer on the second trial?

Witness: Mr. Bill Stokes, William Stokes.

Q. Mr. Stokes was appointed by the Court to represent you on the second trial? A. By the Court.

Q. But the two cases were tried there in an afternoon and a morning and before the same jury? A. Yes, sir.

Q. And then you were immediately resentenced to twenty years, in those two cases?

The Court: He is not attacking them on any—

A. I wouldn't say in front of the same jury, but in front of the same jury box.

Q. All right, sir. Now, I will ask you, Mr. Rice, after you were first sentenced to Kilby Prison in 1962, if this escape that they have punished you for or taken away your statutory good time and industrial good time took place about twenty days after you were first committed to Kilby Prison? A. Approximately.

Q. All right, sir. Now, other than that and the gambling that they took away two months of—of good time, have you had any other [35] misconduct since you have been in

Kilby Prison that would cause you to forfeit any statutory good time or industrial good time that the Alabama law would entitle you to? A. No, sir, I don't.

Q. All right, sir; now, did you receive this computation sheet here from the Classification Officer at Kilby Prison? A. Yes, sir.

Q. Computing that statutory and industrial good time? A. Yes, sir.

Q. And does that purport to be a true and correct copy of those computations that the prisoner is entitled to? A. On the inside of Kilby, that is what they figure it on right there, that is the inside figure and Kilby schedules.

Mr. Melton: All right, sir. We offer this as—

The Clerk: Petitioner's Exhibit number 3—wait, number 1.

Mr. Melton: —Petitioner's Exhibit number—

A. I imagine outside in the main office they do have a more modern or more decorated sheet or something another like that; I imagine they do.

Mr. Melton: All right, sir.

The Court: It will be admitted.

Q. Do you know of any reason, Mr. Rice, why your original sentences in these three cases which total eight years originally were increased to a total of twenty-five years on your retrial? [36] A. No, sir; I can't think of any reason they should be.

Q. Do you know of any reason why the State has not given you credit for the two and a half years you served on those previous erroneous sentences?

Mr. Gish: We object to that.

A. No, sir; I don't.

Mr. Gish: As a matter of law, I think that is—

The Court: After all, they may have some reason for not doing it, and he may know, I don't know.

Mr. Gish: All right, sir.

Q. What was your answer, Mr. Rice? A. I don't know of any reasons at all.

Q. Based on the chart that you have just introduced in evidence, have you computed the length of time you would have had to serve on an eight-year sentence? A. Yes, sir; definitely.

Q. How much time would you have to serve on an eight-year sentence? A. Five years, two months, and six days.

Q. All right, sir; and from February of 1962 to the present time, would you have served more than that, total time? A. I would say I served about five months over that.

Q. Five months more than that maximum time on an eight-year sentence? A. Yes, sir.

Q. Do you have anything else, Mr. Rice, you want to state to the Court or any other statement you would like to make at this time? [37] A. Well, not unless its—not having any harsh thinkings or anything by saying it, but I just don't see where—where—where it is quite right to get that much time for going back for a retrial, I don't—I don't understand that.

Q. And the only legal act you had committed in that interval was the filing of this petition for writ of error coram nobis? A. That is the onliest thing I did, and I did it with—within the rules of Kilby.

Mr. Melton: All right, sir. That's all.

Cross Examination by Mr. Gish:

Q. Mr. Rice, when you first went to Court on February 16, 1962, you plead guilty, did you not? A. Yes, sir.

Q. And you—did you plead guilty to four cases? A. Yes, sir.

Q. All right. How much time was given you in those four cases? A. Ten years.

Q. Ten years? A. (Nodded to indicate affirmative reply.)

Q. Then the computation that you made of eight years— A. Sir?

Q. The computation you made in regard to eight years left out two years that you originally got is that correct? A. Well, when I went back and got this new trial, they nol-prossed [38] the sentence which had taken care of two years—

Q. That is correct. A. —which left eight years.

Q. That is correct; they nol-prossed one of your two-year sentences after that sentence had been set aside on coram nobis is that correct? A. No; I don't believe I understand you.

Q. When you filed your petition for writ of error coram nobis, was it in all four cases? A. Yes, sir.

Q. Was the petition granted in all four cases? A. Yes, sir.

Q. And when it was granted, you—they declared all those sentences void; is that correct? A. That's right.

Q. All right. Then you were retried the first time on December 3, 1964, is that correct? A. That's right.

Q. How many cases were tried at that time? A. Two.

Q. Two cases. And how many witnesses were examined? A. In the first case, they examined about, oh, three or four, the second case, they examined one.

Q. Did you testify? A. No, sir, I didn't.

[39] Q. You didn't testify in either case. You were—did you have a Court-appointed attorney or— A. Sir?

Q. You had an attorney, did you not? A. Well, I was—I was asked by Mr. Stokes to not take the stand.

Q. Was Mr. Stokes your attorney? A. Yes, sir.

Q. Was he appointed by the Court, or did you hire him? A. No, he was appointed.

Q. He was appointed— A. Yes, sir.

Q. —as your attorney? And on—if I understand you correctly, on his advice, you did not take the stand; is that correct? A. Yes, sir, that's right.

Q. Did you discuss with him prior to the trial whether you should plead not guilty; did he advise you how to plead? A. I didn't see Mr. Stokes until like this afternoon of the 2nd or maybe it might have been the 1st—the trial started on the 3rd, I believe, but anyway, the day before the trial started, that afternoon he came by and said, "They are going to try you tomorrow."

Q. All right. A. And he says—

Q. That—at that time, did you talk with him about whether or not to plead guilty or not guilty? [40] A. Not at that time.

Q. Did he ask you questions concerning the facts of these cases, did you discuss it with him? A. I subpoenaed some witnesses, he said we had—didn't have time, because they was going to try the case the next day, said they might try it late that afternoon, but said if they didn't try it late that afternoon, they would try it the next day.

Q. Did you, yourself, personally subpoena those witnesses? A. No, sir; I never did get to subpoena—

Q. Who subpoenaed the witnesses? A. Who did I subpoena?

Q. No; who subpoenaed them? A. I didn't have any; I didn't—I never did get any subpoenaed.

Q. I misunderstood you. Now, let's go back to your first trials, your first pleas of guilty. As I understand it, you got four years in one case and two years in each of three other cases— A. Yes, sir.

Q. —is that correct? A. (Nodded to indicate affirmative reply.)

Q. Now, prior to the time that you entered those pleas of guilty, you did not have an attorney, right? A. No, sir.

Q. All right. Tell me, did you discuss with the D.A.'s office or any other officers the amount of time you would get— A. I did.

[41] Q. —on pleas of guilty? A. Yes, sir; I—I definitely did.

Q. Who did you discuss it with? A. With—I tried to think of that Solicitor's name the other day when I was talking to you, and I couldn't think of his name.

Q. Was his name— A. Not Mr. Stephens.

Q. Was his name Mr. Lewey Stephens? A. No, sir. But he—he told me if I would go up there and plead guilty, that—that he would get me a five-year sentence and not over seven years.

Q. All right, sir; the man you talked with said you would not get over seven years? A. And he told—

Q. Is that right?

Mr. Melton: Was it Mr. Kenneth Fuller?

Witness: Mr. Kenneth Fuller; that is him.

Mr. Melton: He was the Solicitor at that time—

Witness: Yes, sir.

Mr. Melton: —and Mr. Stephens succeeded him.

Witness: Fuller, he is the man told me that.

Mr. Gish: All right, sir.

Witness: I know the man well, but I just couldn't think of his name.

Mr. Gish: Thank you, Oakley.

[42] (*By Mr. Gish*):

Q. Mr. Fuller; you say he told you that you would not get over seven years; is that correct? A. He said—at first he says I would get five, not over seven, and then he kind of laughed and says, "If you get seven, I will do two of them, myself."

Q. And he actually—actually you got ten— A. Yes, sir.

Q. —is that correct? A. (Nodded to indicate affirmative reply.)

Q. After you were arrested after these burglaries were committed, were you on bond? A. No, sir.

Q. You were in jail from the time of your arrest? A. (Nodded to indicate affirmative reply.)

Q. And you did not hire an attorney—attorney, and none was appointed? A. No, sir.

Mr. Gish: I believe that's all.

Re-Direct Examination by Mr. Melton:

Q. Did you have any money to make bond or to hire an attorney? A. I did until they confiscated it and taken it away from me.

Q. Is that at the original arrest? A. The original arrest.

Q. I see. Did you have any money to make bond on the—after the [43] original convictions were set aside— A. No, sir.

Q. —and while you were awaiting retrial on the cases to be retried? A. No, sir.

Mr. Melton: That's all.

Mr. Gish: That's all.

Mr. Melton: That's all.

The Court: As a matter of interest, Rice, let me ask you; who prepared this petition for you that you filed in this Court?

Witness: A friend of mine in Kilby helped me; me and him together; his name is Heflin, Mr. Heflin.

The Court: Who?

Witness: Heflin.

The Court: What is his first name?

Witness: Your Honor, I hate to say it, but, you know, out there we don't get too well acquainted with one another; you know a guy four or five years, and you wouldn't get too well acquainted. We call him Foot—Foots Heflin, that is all I can say, and I talk to him every day and—

The Court: Who typed it out for you?

Witness: He typed some of it, and I got some of it typed at other places.

The Court: Where?

Witness: Well, I got someone on the fifth floor to type some, and I typed some at the cotton mill.

[44] The Court: Uh, huh; who typed the brief for you on the law?

Witness: You mean like the allegations and stuff?

The Court: No, your brief—yes; you call it allegations here; yes?

Witness: Different ones; myself and him, and, you see, they got a little law library there in the library—

The Court: Yes.

Witness: —and you go in there and check a book out, and you can sit there and read it as long as you

want to, and whenever you get through with it, you check it back in, and sometimes in exceptional cases they will let you take a book to the cell with you at night, and then you can sit up and read—

The Court: Who wrote your brief for you?

Witness: Well, I would say no certain one; two or three of us.

The Court: Who were they?

Witness: Well, me and Heflin and guy called Franklin.

The Court: Who?

Witness: Franklin; I believe he helped write some of it.

The Court: Who else?

Witness: That is about it.

The Court: I just wondered; it is a very good, very good brief.

[45] Witness: Yes, sir.

The Court: I just wondered who your lawyer was out there. Which one of them would you say was your lawyer?

Witness: Well, I wouldn't say that any of them was my lawyer; in other words, just like I say, it was just all put together and bunched in and did, and like I have guys come to my cell, or fellows, rather, and they ask me about a certain law; if I know it, I tell them; and I go by their cell, and I will ask them about a certain law; and if they know it, they will tell me.

The Court: Yes.

Witness: And if we—neither one of us knows it, we go by the coffee shop and get a cup of coffee, and then go down to the library and get the book, and look it up, and then read it until we understand it.

The Court: Is it easier for you to file these petitions now than it used to be?

Witness: Well, yes, sir; for when they first started filing petitions, they would put them in the dog house and lock them up, and any way to keep them from getting the stuff to file them with, or any way to file them, and then there was some boys, you know, they wrote their people and did this. I think some part of the Federal came out there, Government, and told them to go ahead and let them file them, that that was their rights or something another like that. And now you can go—you can go to the front office and tell them how many sheets of paper you want, they will give [46] it to you.

The Court: To file your petition with?

Witness: Yes, sir; to file the petition with.

The Court: Do you have a typewriter?

Witness: Well, there are a few typewriters in the cell block. Here in the past three or four months, they taken them up; they taken up most of them that was personally owned, you know.

The Court: It is easier to file one in Federal Court than it is in the State Court; it is easier to file a habeas corpus in a Federal than it is a coram nobis in the State?

Witness: Judge, Your Honor, I just couldn't answer that, for I—either way I answer it, I could be wrong, so I won't—I won't go into it. I never had too much trouble. I know—of course, I haven't done too much filing. I did go to Supreme Court, and for some reason another I didn't go like I should go, so they denied me on jurisdiction. So—

The Court: Has there been any new rule as far as you know in the last few months about it is all right

to go ahead and file any of these habeas corpuses you have in the Federal Court if you want to?

Witness: On; yes, sir. Here in Atlanta, not too long ago, about six or eight weeks ago, maybe a little longer, they had a fellow over there that they referred to as a lawyer within the walls, and they questioned some guys about it, and they called him out and questioned him, and he told them, he says, "Well, I don't [47] charge anybody for anything"; he says, "Anything I do," he says, "I do it just trying to help somebody," and he says, "No way I would accept a nickel for it." So it went from there. It was nothing done about it, so—and I have—

The Court: You say that was where?

Witness: In Atlanta Federal, Federal Penitentiary.

The Court: I am talking about out here at Kirby; has there been any new rule that gave you the green light on filing these habeas corpus petitions in the last few months?

Witness: No, sir; no more than what you would read and study in those books.

The Court: What I am asking you, has it become easier for you to file them recently than it was in the past?

Witness: Oh; yes, sir; yes, sir; definitely; yes, sir.

The Court: When did it get easier?

Witness: Oh, I would say for the past two or three years, why, you just go out there and tell them how much paper you want and something another like this and go ahead and write your writ and file it.

The Court: That is all I want to ask him.

Witness: Yes, sir.

By Mr. Melton:

Q. Mr. Rice, in your case, did you file your petition in your case after you read a newspaper article on the decision in Patton versus North Carolina? A. Yes, sir; this here is what got me started going to the library [48] and inquiring and picking up a little odds and ends and little allegations here and there.

The Court: How much education do you have, Mr. Rice?

Witness: Sir?

The Court: How much education do you have?

Witness: I have eighth grade.

The Court: All right. I was just trying to find out who wrote his petition; he didn't write it.

Witness: No, sir; I didn't write the petition.

The Court: He didn't write it; I was just trying to find out who wrote it.

Witness: Heflin is the one that actually, Your Honor, worked with me on writing it.

Q. But after you read this newspaper article, then you started getting help and writing your petition? A. (Nodded to indicate affirmative reply.)

The Court: I have a real reason for asking; I am being flooded with these. I have had over two hundred in the last year from Kilby, and the State Court evidently has stopped having hearings on coram nobises and just letting them lie, and the petitioners are alleging that they can't get any action in State Court, and for all practical purposes, they have exhausted their remedies. I was trying to find out what is at the bottom of it.

Witness: (Nodded to indicate affirmative reply.)

Mr. Melton: We introduce this newspaper article.

[49] The Clerk: Petitioner's Exhibit number 3.

Q. Do you understand, Mr. Rice, that in the Aaron case the Alabama Courts have refused to pass on the question of whether a prisoner is entitled to any credit for prior time served?

Mr. Gish: We object, Your Honor.

The Court: I sustain it.

Mr. Melton: All right, sir. That's all; you can come down.

The Court: Do you have anything else?

Mr. Gish: No, sir.

The Court: Other than this computation that Mr. Dean is going to make—and I take it he will just mail it in?

Mr. Melton: Yes, sir.

The Court: Do you have anything else to offer?

Mr. Melton: Let me just—.

(Mr. Melton had conference with petitioner at counsel table.)

The Clerk: Was this admitted?

The Court: It is not worth anything. Do you have any objection to this newspaper article?

Mr. Gish: No, sir; I do not.

Mr. Melton: We rest, Your Honor.

Mr. Gish: Warden rests.

The Court: You want to file any other law with me on it?

[15] Mr. Gish: No, sir; I believe I have done the best I could in the brief already filed.

The Court: All right. Do you have any other authorities you want to file?

Mr. Melton: Yes, sir; Your Honor. We would call the Court's attention to the annotation in 12 A.L.R. 3rd 978, particularly with the cases starting on page 983, which indicate that the States of Arkansas, California, and New Jersey, as well as the First Circuit in Marano and Fourth Circuit in Patton, have all clearly held that you cannot increase the punishment on a retrial for any reason. And then, of course, this Court—

The Court: What are the Circuits where they say you can't do it where no reason is given?

Mr. Melton: The First Circuit in Marano and the Fourth Circuit in Patton.

The Court: That is where they attempted to justify it, and they say you can't even justify doing it.

Mr. Melton: That's right, sir.

The Court: What are the—what are the jurisdictions that say you can't do it where you do not attempt to justify it?

Mr. Melton: Seventh Circuit in U.S. versus White, Your Honor, apparently holds you can increase the punishment without any reason, that you don't have to justify it under any circumstances. And then the Third Circuit in Starner versus Russell is just completely contrary to Patton and Marano in First and Fourth Circuits, [51] but it appears to us you have a —and we find no Fifth Circuit case right on it; it appears to us you have a direct conflict between the First and Fourth and the Third and Seventh Circuits, and we think the reasoning in Patton and Marano is completely applicable to this case, and

should not be increased, that no evidence of any change in circumstances.

The Court: Yes; well, I am not impressed with his contention—and I take it he is making that—that he is entitled to carry over any good time; that is an administrative matter, and no evidence here to show any abuse at all. I have expressed myself in Hill against Holman, whether or not he is entitled to, in a sentence subsequently imposed, to be given credit on the time he has served on an illegal sentence, but that didn't have anything to do with the granting or the deprivation of statutory or industrial good time.

Mr. Lawson: Your Honor, in that case, you did cite—

The Court: Yes, I know; I cited that Hoffman case and that other case.

Mr. Lawson: Youst case dealt with the good conduct, and it has been cited, also, in Short versus United States, a recent case which grants—

The Court: He served on the first sentence, 6427, from February 16, '62, to August 28, '64.

Mr. Melton: Approximately two and a half years, Your Honor.

[52] The Court: Yes; and I take it he didn't accumulate much, if any, good time. Mr. Dean is going to compute that for me.

Mr. Melton: Yes, sir; but we—we take issue with Mr. Dean when he says that—when he escaped within twenty days after he was admitted—

The Court: Yes.

Mr. Melton: —that that can be related in the future; the only—the only—

The Court: What is wrong with doing that?

Mr. Melton: The only—the statute prohibits it; just—the only thing the statute does, when you have a violation, you forfeit any good time you may have previously accumulated; you can't—

The Court: Is it restricted to having previously accumulated?

Mr. Melton: Yes, sir; it is a forfeit. The statute uses the word, "Forfeit," as I recall it.

Mr. Gish: Your Honor, if I may, you could—you can forfeit in the future as well as forfeit retroactively.

The Court: Of course; I am not impressed with that. I don't see any objection at all to—to forfeiture in the future of time for—for attempted escape or for escape or something; there have to be some disciplinary rules and some punishment—

Mr. Melton: Yes, sir.

The Court: —even in the penitentiary.

[53] Mr. Lawson: Your Honor, I think what we are getting to is basically that we feel that the sentence should be considered by the Court as having started when he was first sentenced and run for eight years, with all good time deductions and industrial time deductions figured for that period of time. Now, we were unsure before we came to Court exactly what he would be entitled to the way of these good time deductions, whether taking those into account he would be entitled to immediate release or not.

The Court: Well—

Mr. Lawson: I think either way—

The Court: —we must assume for this computation that Mr. Dean is going to do for the Court that they were entitled to—and I am going to assume that

—forfeit good time to be earned in the future when he escaped the first month he was in the penitentiary.

Mr. Melton: Well, when he does that, Your Honor—

The Court: I don't read that statute as barring their doing that.

Mr. Melton: The language is, "Such extra good time allowances may be forfeited for misconduct in the same manner as deductions for good conduct."

The Court: Yes.

Mr. Melton: So we say you can't forfeit something you haven't earned.

The Court: Well, the Army has been forfeiting pay and allowances for six months in the future for many years.

[54] Mr. Melton: But regardless of that, Your Honor, we think the basic question is whether they could increase—

The Court: That just comes to mind.

Mr. Melton: Yes, sir. Perhaps there is a difference in a claim for money and a man's liberty.

The Court: Yes; I used to prosecute and defend some when I was in the Army. On a sentence you forfeit pay and allowances for six months to come, you don't forfeit what you have already made. I don't see a thing wrong with forfeiting good time to be earned in the future administratively, I don't see anything in that statute that bars it. I don't want to get concerned too much with that.

Mr. Melton: Yes, sir.

The Court: I do want to get concerned with how much time he has served on that previous sentence and then, of course, there is no way to keep from

being concerned, under the issues in the case, with the imposition of more severe sentence upon going back before the Court.

Mr. Lawson: Your Honor, you mentioned some of the cases that—that take a kind of in between view and hold that the sentence—greater sentence can be imposed if it is explained.

The Court: I tried to focus Mr. Melton's attention to those—those sentences.

Mr. Lawson: I think at least maybe the Short case—I am not certain right now, we cited it for another proposition—but it may be the one that holds that way, but I would—and also, [55] the Patton case, the lower Court, District Court, wrote directly on that. And the language of the District Court that I think does express these views says that while it can be justified, the burden is on the State to prove the justification of the sentence.

The Court: Yes, while we are on that, you might send me a letter memorandum on the practice of imposing larger sentences where defendants go to trial than where they plead guilty. The Fifth Circuit has addressed itself to that point.

Mr. Gish: Yes, sir, yes, sir; one—

The Court: Says you can't do it.

Mr. Gish: One Fifth Circuit case—

The Court: You can't do it; you can't penalize a man for exercising his constitutional right to require the State to prove his guilt.

Mr. Gish: Your Honor, may I say one thing here in connection with one of these points? In the Hill against Holman case, Your Honor's order is—is broad enough to release this man if his time is up;

however, in that Hill case, Mr. Hill had served enough time to serve his sentences except for the year and a day he got on—on his last sentence, if you will remember, and his petition was not filed until after he had served the last year and a day. Our contention in that respect is that on its facts, the Hill case goes no further than the Youst case on its facts; that follows the Youst case. Now, I think there is, sir, a valid argument here that when sentences are declared void, they are void sentences; [56] they cannot be served as if—if time was served in the penitentiary, there must be something valid upon which to attach that time. In this—

The Court: Well, they were—the indictments were not set aside. The indictments were not set aside.

Mr. Gish: No, sir—

The Court: The cases, the criminal cases, were still pending against him, and the State of Alabama was still prosecuting him, and they did reprosecute him, and they resentenced him. Why can't they attach to those?

Mr. Gish: Why can't they attach—

The Court: They are not new cases; they are the same cases that the State made the mistake in and sent him to the penitentiary for two and a half years.

Mr. Gish: Your Honor, my—my position is—is that he was not sent to the penitentiary under any valid sentence until these last cases were tried. Now, I am not saying that he hasn't been wronged. He—I think that—the time served under a void sentence, with no credit for it in any way, there may be a wrong there, but I am wondering what the remedy for the wrong is. Is this—

The Court: Where you resentence him in the same case—where you resentence him in the same case, isn't it very simple to conclude that the remedy should come in reduction of the sentence to the extent that he has been required to serve an illegal sentence in that same case?

[57] Mr. Gish: Suppose, Your Honor, that on a plea of not guilty, he was acquitted?

The Court: Then I would suggest, if I were representing him, that maybe he go before the State Board of Adjustment.

Mr. Gish: All right; all right, sir. I was just trying to make the point—

The Court: Or get him a member of the Legislature to represent him before the State Board.

Mr. Gish: I was just trying to make the point, Your Honor, that if there is a wrong here, and—if a wrong here, that should the remedy be any different for the man subsequently convicted than it is for a man subsequently acquitted. Should not—

The Court: Yes.

Mr. Gish: Should not the remedy be the same?

The Court: There is no—there is no remedy available where he is subsequently acquitted, because there is no case there in which he has been illegally punished by incarceration in which to afford the remedy; the case is wiped out. On a subsequent conviction, the case in which he has been illegally punished is still there, and he is still being illegally punished without having been given credit.

Mr. Gish: Of course, I see that argument; I just merely say this other point that I brought forth

does have some substance. The Tenth Circuit in Newman against Rodriguez so held.

The Court: Thank you, gentlemen.

[58] Mr. Gish: Thank you, sir.

The Court: Recess until further order.

Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25412

CURTIS M. SIMPSON, Warden,
Kilby Prison, Montgomery, Alabama,

Appellant,

versus

WILLIAM S. RICE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA.

(May 30, 1968.)

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge.

TUTTLE, Circuit Judge: William S. Rice in February, 1962, entered pleas of guilty in four separate criminal cases in the Circuit Court of Pike County, Alabama. He was sentenced to a total of ten years in the state penitentiary, the term consisting of four separate sentences, the first for four years and the remaining three for two years each. In August, 1964, the judgments and sentences in these cases were set aside by the Circuit Court of Pike County in a

coram nobis proceeding on the ground that appellee was not represented by counsel at the time of his original pleas.

The petition for habeas corpus to the District Court alleged that the appellee was retried in three of the four cases at which time the same trial court sentenced him to a total of twenty-five years, the term consisting of a sentence of ten years on each of the first two charges and five years on the third. The fourth charge was dismissed because of the absence of a witness. Rice attacked these subsequent sentences to the extent that they exceeded the original sentences on the original pleas of guilty and to the extent that they did not also give him credit for the time served under the vacated sentences.

The trial court overruled the State's motion to dismiss the petition for failure to exhaust state remedies, there being at the time of the hearing no adequate state procedure which the appellee was required to pursue. Although an intervening decision by the Court of Appeals of Alabama, *Goolsby* v. *State*, Sixth Division 202 (not reported) might have some bearing on the merits of this case, under the principles of *Fay* v. *Noia*, 372 U. S. 391, we should not remand the case to require the appellee to pursue a state remedy at this stage of the proceedings.

The District Court entered a judgment granting the relief sought by the appellee. It would be useless for us to add to the reasoning or conclusions announced by the trial court whose opinion may be found at 271 F. Supp. 267. We, therefore, affirm the judgment of the trial court on the basis of Judge Johnson's opinion which is adopted as the opinion of this court.

The judgment is AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25412

D. C. Docket No. CA 2583-N

CURTIS M. SIMPSON, Warden,
Kilby Prison, Montgomery, Alabama,

Appellant,

versus

WILLIAM S. RICE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

Before TUTTLE and DYER, Circuit Judges and MEHRTENS, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 30, 1968

Issued as Mandate: June 21, 1968